A TREATISE ON THE LAW OF INSURANCE,

IN FOUR BOOKS;

I. Of marine insurance,
II. Of bottomry and respondentia,
III. Of insurance upon lives,
IV. Of insurance against fire.

By SAMUEL MARSHALL,
SERJEANT AT LAW.

THE SECOND EDITION,
WITH CORRECTIONS AND ADDITIONS.

IN TWO VOLUMES.
VOL. I.

Laudo mercatorem, qui fidem, etiam contra leges datam, servat; sed, et laudo judicem, qui fraudes et nequitias mercatorum non fovet, et rescindit pactiones quas lex rescindi jubet. Judicis est leges sequi; nec disputare an turpiter faciat assecurator, qui fidem datam violat.—Esto, turpiter faciat; sed, et turpiter facit qui contra leges paciscitur.

Bynk. Quæst. jur. priv. lib. 4. c. 5.

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ADVERTISEMENT

TO THE SECOND EDITION.

As this work, the fruit of much labour and refearch, was fent into the world as a fort of difcharge of that debt which every man is faid to owe to his profeffion or his country, it has been my earneft wifh, in preparing it for a fecond impreffion, to give it the advantage of every correction and improvement which experience and reflection have fuggefted fince its firft publication. And on this head my anxiety has been greatly increafed by the favourable reception with which the work has been honoured, not only in the commercial world, whofe fuffrage I am proud to acknowledge, but alfo in my own profeffion, and particularly by fome whofe approbation muft be peculiarly grateful to me.—In the prefent edition will be found, properly abftracted, all the cafes which have been determined in our courts on the fubject of infurance fince the publication of the firft edition, with fome others which had efcaped my former refearches. Thefe have been introduced in their proper places, except a few which were publifhed too late to be there inferted, but which are added in an appendix, and referred to in the index. Some parts of the work have been re-written, and fome neceffary improvements have been made

in the arrangement, which have rendered a new numbering of the pages unavoidable. But, to compenſate in ſome meaſure for this, the index to the preſent edition will be found much more copious, comprehenſive, and analytical than the former.—In the table of the names of the caſes cited, thoſe under each letter are divided into two parts, the one beginning with the names of the plaintiffs, the other with thoſe of the defendants.

S. M.

Serjeants Inn,
4th Nov. 1808.

PREFACE.

THE design of the following work has been to collect from every authentic source, and to ascertain, with as much precision as the subject would admit of, the genuine principles of the law of insurance; and so to arrange and methodise them, that not only lawyers, but merchants and others, might, without much difficulty, acquire a competent knowledge of them.

It is now many years since I first conceived the idea of attempting such a work. But after I had made some progress in it, I perceived that, if completed upon the plan I had adopted, it would have been found too abstract and elementary, to afford that assistance to the commercial world, or even to the profession of the law, which it was my ambition to render to both.—I perceived that the leading principles which govern the contract of insurance lie within a narrow compass; and that it is only the application of those principles to particular cases, that could form a work of general utility. My unwillingness to retrace my former steps, and to go again over the ground I had so recently trodden, concurring with other circumstances, induced me, at that time, to lay aside my design; and it was not till lately that I determined to resume it. But though, in my new undertaking, I have adopted a different plan, and made a new arrangement of the subject, still I found that my former researches, and the collections I had made, greatly facilitated my labour.

The utility of works of this nature depends, in a great meaſure, on arrangement. Method, however, is only uſeful ſo far as it conduces to perſpicuity. Too ſtrict an adherence to methodical diſtribution only defeats the end which is meant to be attained by it. A multiplicity of diviſions and ſubdiviſions ſerve but to burthen the memory and weary the patience. I have therefore avoided as much as poſſible, diviſions too large and comprehenſive, on the one hand, and too trifling and minute, on the other.

The different branches of marine inſurance ſo blend themſelves with each other, that the forming of any diſtinct and ſatisfactory analyſis of it, is a taſk of no inconſiderable difficulty. In the various treatiſes on this ſubject which I have had occaſion to examine, I have ſeen no arrangement that I could entirely approve.—Of that now adopted, the reader will be able to form his own judgment, upon inſpection of the following analyſis. It will there appear that the ſubject has been divided, as nearly as it could be, according to the natural order of events, from the firſt idea of the contract, till the final cloſe of the tranſactions upon which it is to operate, or which ariſe out of it.

The numerous caſes that have been decided in the courts of *Weſtminſter*, upon queſtions of inſurance, within the laſt 60 or 70 years, afford the beſt materials for a treatiſe on this ſubject: They at once ſupply the rules of law, and ſhew the application of them.—And as much of the merit of a work of this nature depends on its being as complete as poſſible within itſelf, and ſo as to render a recurrence to other books ſeldom neceſſary, I have, in order to give the preſent work this advantage, in as great a degree as the limits I had preſcribed

ſcribed to it would admit, introduced into it all the decided caſes I have been able to collect, upon each branch of the ſubject, rejecting ſuch only as I deemed unworthy of notice; ſo that it may not, perhaps, be too much to ſay, *Omnia mea mecum porto.* In abridging theſe caſes I have obſerved one uniform rule.—Each will be found to conſiſt of three diſtinct parts;—the facts, the deciſion, and the reaſons aſſigned for it.—Where the deciſion cannot be well underſtood, without ſhewing the points inſiſted upon in argument, theſe are briefly ſtated. Though I have taken much pains to ſhorten each caſe as far as the plan of the work would admit, I am ſorry to find the book ſwelled to a ſize conſiderably beyond that to which I had hoped to confine it.

A few of the caſes have never before been in print. Some others I have cited from manuſcript notes, which ſeemed preferable to thoſe already publiſhed.

Under each head I have endeavoured to lay down, with the requiſite perſpicuity, the principles of the law, as I have been able to collect them from decided caſes and the beſt authorities, ancient and modern, which I have been able to procure.

There is ſcarcely any contract which affords a greater number of queſtions of doubt and difficulty than that of marine inſurance. Though the principles of the law applicable to this contract are, in general, well defined; yet the policy being uſually of one uniform tenor, and the tranſactions upon which it is to operate, infinitely various and complicated, the conflicting rights of the parties are often ſo equally balanced, that it is impoſſible to decide between them, without reſorting to very nice diſtinctions. It ſometimes happens, too, that the real juſtice of the caſe, as between the parties, muſt yield to the ſtrict rules of law: And it ſeems to have been a general ſubject of complaint, in moſt

 commercial

commercial countries (*a*), that, upon ſuch occaſions, courts of juſtice are ſometimes tempted to forſake the rules of law, and to lean in favour of the ſuffering party. It is not to be wondered at, then, if the doctrines delivered from authority, even in *Weſtminſter Hall*, ſhould be found, in ſome few inſtances, to be irreconcileable with the genuine principles of the law of inſurance.

The compiler of a work like the preſent, which is not a mere *collection of caſes*, but profeſſes to *treat* of a particular branch of the law, ought to be capable of examining the principles upon which the rules that may have have been laid down, either by writers on the ſubject, or by public tribunals, have proceeded. This, indeed, is the principal duty of the office he takes upon himſelf, and he is bound to perform it, ſo long at leaſt as he conducts the enquiry with candour and temperance of judgment. Wherever, therefore, I have found any doctrine advanced, or any judicial deciſion, which militated againſt an acknowledged principle of law, I have, with a proper freedom, but, I hope, with decency and reſpect, pointed it out to the notice of the reader, with ſuch obſervations as I thought myſelf called upon to make on the occaſion. I have not, however, unneceſſarily ſtepped aſide to make captious objections. I have only ſought, where the occaſion called for it, to reſtore the true principles of the law; and the better to enable me to do this, I have availed myſelf of the works of foreign writers of acknowledged authority upon the law of nations, upon marine law, and the law of inſurance; and I have freely had recourſe to them, wherever their aſſiſtance would enable me to clear up a doubt, or ſolve a difficulty.

(*a*) Vid. *Bynk.* Quæſt. jur. priv. lib. 4. c. 5.; *Straccha*, p. 541, n. 6: *Emerig.* t. m. 2. p. 355.

It is ſaid that good faith ſhould preſide in all the tranſactions of commerce, and equity in the deciſions of the queſtions to which it gives riſe.—That good faith ſhould preſide in all the tranſactions of commerce, is a truth which cannot be too frequently repeated, or too forcibly inculcated.—And that equity ſhould, on proper occaſions, have its due weight in the deciſion of commercial queſtions, I am alſo ready to admit. But, by equity I would not be underſtood to mean thoſe wild and fanciful notions of right, in which no two men can agree; but that rectitude of judgment which is the reſult of natural reaſon, enlightened and directed by the wiſdom of the law. Under pretence of equity, the law is not to be forſaken. Where that is clear, it muſt prevail, however hard it may appear in particular caſes. *Hoc quidem perquàm durum eſt, ſed ita lex ſcripta eſt.* It is ſafer, perhaps, to rely on the conſcience of the law, than on the conſcience of any man, however wiſe and virtuous he may be. *Omnia ſunt incerta, cum à jure diſceſſum eſt. Nec præſtari, quidquam poteſt, quale futurum ſit, quod poſitum eſt in alterius voluntate, ne dicam libidine* (*b*).

Nothing, indeed, can more promote the true intereſts of commerce, than that the law which regulates the contracts of merchants, ſhould be well underſtood. Such contracts are the buſineſs of every hour. Merchants cannot reſort, upon all occaſions, to profeſſional advice. They ought, themſelves, to poſſeſs ſufficient knowledge to enable them to tranſact their ordinary buſineſs without ſuch aid. A man who purchaſes an eſtate may act with caution; but mercantile tranſactions will ſeldom admit of much deliberation. A merchant, in many caſes, muſt decide at once, and act upon his own judgment; and a work that will enable

(*b*) *Cic.* ad fam. lib. 9. epiſt. 16.

him

him to do so with safety, in a very important branch of his business, and so as sometimes to obviate disputes and litigation, cannot fail of being beneficial to him. "*Le triomphe de la justice est de prévenir les procés,*" is the saying of an elegant writer. If the present work should at all conduce to that end, or, in any material degree advance the general prosperity of my country, my pains will be sufficiently rewarded.

With respect to *Bottomry* and *Respondentia*; though these contracts are not at present much in use in this country, I have collected from the *Roman* law and from foreign authors, such materials as seemed necessary to enable me to form a consistent treatise on this branch of the subject.

Insurance upon Lives, and *Insurance against Fire*, are now become very important contracts in this country. Upon each of these I have put together all the materials I could collect, and have digested them into such a form, as seemed most likely to render these parts of the book useful to such persons as may have occasion to consult them.

Having thus shortly explained the nature and design of this work, I now, with considerable diffidence, submit it to the judgment of my own profession, and of the commercial world; *Postulans a lectore, ut si quid superfluum vel perperam positum in hoc opere invenerit, illud corrigat et emendet, vel conniventibus oculis pertranseat; cum omnia habere in memoria, et in nullo peccare, divinum sit potius quam humanum* (a).

SAMUEL MARSHALL.

SERJEANT'S INN,
Feb. 2d, 1802.

(a) *Bract. de leg.* 1.

ANALYSIS.

BOOK THE FIRST.

Of Marine Inſurance.

Chap.

Succouring

6. Of

Chap.

BOOK THE SECOND.

Of Bottomry and Respondentia.

BOOK THE THIRD.

Of Insurance upon Lives.

BOOK

BOOK THE FOURTH.

Of Insurance against Fire.

A

TREATISE

ON THE

LAW OF INSURANCE.



BOOK THE FIRST.

Of Marine Insurance.

CHAP. I.

Preliminary Discourse.

INSURANCE is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other, against certain perils or risks to which he is exposed, or against the happening of some event (*a*). The party who takes upon himself the risk is called the *insurer*, sometimes the *underwriter*, from his Insurance defined.

(*a*) *Contractus assecurationis, id est avertendi periculi, dicitur contractus innominatus.* FACIO UT DES, DO UT FACIAS, *unde debet regulari juxta naturam contractuum quibus assimilatur; assimilatur autem emptioni et venditioni, propter pretium quod datur ratione periculi; quia qui assecurationem facit propter pretium, dicitur emere eventum periculi. Rotæ Genuæ, decisio* 3. *n.* 28. *decisio* 39. *n.* 9. *Assecuratio est conventio de rebus tuto aliunde transferendis, pro certo præmio, seu est aversio periculi, Stypm. pars* 4. *ch.* 7. *n.* 262.—*Aversio periculi ita dicta quod aliquis alterius periculum in mari aversum it, aut in se suscipit, Locen.* lib. 2. ch. 5. n. 1.—Vid: *Valin* on art. 1. h. t. p. 26. *Potier*, h. t. n. 1, classes this among the contracts which he denominates *aliatoires*, that is, pertaining to *gaming* or *risks*. *Roccus*, not. 6. says, *Hujus contractus & commercii lucrum et damnum dependet à merâ sorte et fortunâ.*

B subscribing

subscribing his name at the foot of the policy; the party protected by the insurance is called the *insured*; the sum paid to the insurer, as the price of the risk, is called the *premium*; and the written instrument, in which the contract is set forth and reduced into form, is called a *policy of insurance*.

Abuses of insurance restrained.

The risks against which insurances may be made are infinite. Formerly great frauds were practised upon ignorant and unwary persons, under colour of insurances of different sorts, which the legislature found it necessary, from time to time, to repress. It appears that, in the reign of Queen *Ann*, several persons opened offices for making insurances on *marriages*, *births*, *christenings*, *service*, &c. whose fraudulent practices were soon found so injurious to the public, that by the stat. 9 *Ann*. *c*. 6. *s*. 57. a penalty of 500*l*. is imposed on every person setting up such office, and 100*l*. on every person making such insurances in any office already set up.

But the most mischievous species of these fraudulent insurances is that upon *lottery chances*, which, long after the passing of the above act, sprung from that spirit of gaming which public lotteries are but too well calculated to excite in the people. These, however, after many unsuccessful endeavours to restrain them in the annual lottery acts, have, by the stat. 27 *G*. 3. *c*. 1., which was made expressly for that purpose, been considerably diminished.

The insurances of greatest public utility, and to which the following work will be confined, are,—1. *Marine insurance*;—2. *Bottomry* and *Respondentia*, which are a species of marine insurance;—3. *Insurance upon lives*;—and 4. *Insurance against fire*.

The first of these, being of the greatest utility and importance, will be the first subject of our consideration.

Marine insurance.

Marine insurance is that which is applied to maritime commerce, and is made for the protection of persons, having an interest in ships, or goods on board, from the loss or damage which may happen to them from the perils (*a*) of

(*a*) In compliance with custom the word *peril* is here used in a sense in which it is not usually understood. It does not here mean

of the sea, during a certain voyage, or a fixed period of time.

The utility of this contract consists in the protection it affords to maritime commerce, by dividing losses, when they happen, among many, so as to make them fall lightly upon each; and thus individuals are encouraged to embark their capitals in hazardous enterprises.—Without insurance, foreign commerce could only be carried on by the few who are wealthy enough, or bold enough, to run alone the risks which necessarily attend the prosecution of it. These would engross all maritime commerce to themselves, and their profits, for want of competition, would of course be immoderately high. The utility of marine insurance cannot be better expressed than in the words of the preamble to the stat. 43 *Eliz. c.* 12. which recites that, 'By means of policies of insurance it cometh 'to pass, upon the loss or perishing of any ship, there 'followeth not the undoing of any man; but the loss 'lighteth rather easily upon many, than heavily upon 'few; and rather upon them that adventure not, than 'those that do adventure; whereby all merchants, espe-'cially of the younger sort, are allured to venture more 'willingly and more freely.' Its utility.

Much pains and industry have been employed in fruitless endeavours to discover the origin of marine insurance. These, like every attempt to trace the first imperfect beginnings of those inventions which have arisen, by imperceptible degrees, out of human necessities, have only terminated in doubt and disappointment. Some enquiry, however, upon this subject, may be expected in this place; and yet the most careful researches scarcely enable us to ascertain about what time this contract first came into general use even in *Italy*, where it seems to have had its origin. Whether its origin can be traced.

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mean *danger*, *hazard*, *jeopardy*, according to its common acceptation; for to say that a loss was occasioned by a particular peril, would, according to that acceptation, be to say that the loss arose from the *danger* of such loss. In insurance, the word peril generally signifies the *happening* of the event or misfortune of which danger was apprehended.

Cleirac's account of its origin.

Cleirac, in his commentary on the first article of *Le Guidon*, following *Giovan Villani* in his universal history, says that policies of insurance and bills of exchange were unknown to the ancient *Roman* jurisprudence, and were the invention of the *Jews*, when they were banished from *France* by *Dagobert*, *Philip Augustus*, and *Philip the Long*, to enable them to draw from thence the money and goods which they had concealed, or deposited in the hands of their friends before their departure; that they withdrew their money by means of short notes expressed in few words, such as are still used in bills of exchange; that, in order to withdraw their effects, their suspicions suggested to them the first rude beginnings of policies of insurance, whereby, "*by their jewish arts*," all the risk and danger of the voyage fell upon the insurers in consideration of a *present*, which was called a *premium*.—So that, according to *Cleirac*, bills of exchange and policies of insurance are of *jewish* birth and invention, and have nearly the same name,—*Polizza di cambio*, *Polizza di securanza*. He adds that the *Italians* and *Lombards*, who were spectators of this *Jewish* intrigue, and the instruments employed in conducting it, preserved the forms of these instruments, which they afterwards well knew how to avail themselves of, in conveying out of *Italy* the effects of the *Guelphs*, when driven from thence by the *Gibbelines*.—But this relation, though adopted by so respectable a writer as *Cleirac*, carries with it very little of the air of probability.

Be this as it may, maritime commerce, carried to any considerable extent, must necessarily draw after it the contract of insurance, from the desire natural to all men to be protected against the accidents of fortune. The utmost we can do, therefore, towards ascertaining, about what time this contract came into use, will be, to trace the progress of commerce till it attained that height, which rendered insurance necessary to its farther advancement. This inquiry will be facilitated by an account of the various systems of marine law which have been promulgated by the different maritime states of *Europe*, from time to time, as the advancement of commerce rendered

them

them necessary; and by shewing about what period laws for the regulation of the contract of insurance first began to make a part of these systems.

Whether known to the ancients.

If the ancients were unacquainted with this contract, it was because their maritime commerce never attained the degree of greatness which rendered its protection necessary. History affords us no information from which we can form any conjecture, whether it was in use among the *Phœnicians*, the *Carthaginians*, or the *Greek* republics.

It is true that each of these states did carry on foreign trade to an extent that would have rendered it a subject of insurance, had this contract been already in use among them. But it seems extremely probable that this trade was never of sufficient magnitude, nor sufficiently perilous, to induce the necessity of insurance, or to oblige them to resort to this contract as a means of enabling private adventurers to carry it on.

As to the *Romans*, though the contract of bottomry which is a species of insurance, was well understood among them, as we shall have occasion to shew hereafter, there is no mention of insurance in the *Roman* law; nor is there to be found in any book of that law, or in the *Latin* language, even a name for this contract, the word *assecuratio* being a barbarism adopted in *Italy* about the 12th or 13th century, when insurance probably first came into use in that country. Nor does the history of that people any where afford a well-founded reason to believe that this contract was ever in use among them. It is true, that though they had no naval power before the first *Punic* war, they became masters of the sea before the second; and that, after the battle of *Actium*, their maritime strength was considered as equal to their dominion on land. But that warlike and ambitious people, during almost all the time of their greatness, cultivated navigation only with a view to war and conquest. Commerce was to them a subject of inferior consideration, which they left to be carried on by the slaves and freed-men of the great. To extend their conquests and consolidate their power, was their principal employment, and almost the only object of their care. Finding themselves mas-

ters of the greatest part of the then known world, which they had reduced to subjection by a series of unparalleled conquests, they might easily have engrossed the whole commerce of the nations they had subdued. But they disdained the sober pursuits of industry, the want of which they compensated by the spoils of the conquered provinces.

Besides, the jealous policy of the *Roman* state, by an ancient law established by *Clodius* the tribune, in the time of the first *Punic* war, and afterwards renewed by the *Julian* law, prohibited senators from building or possessing ships, lest the power resulting from this species of property might render them formidable to the state.

What commerce they carried on was principally, if not wholly, confined to the *Mediterranean*, *Egean*, and *Euxine* seas, which were almost surrounded by their own dominions, and guarded by the armed fleets of the state, so as to remove all apprehension of *enemies or pirates*. Their small vessels rarely ventured out of port but in fine weather, and then only to coast along the shores, seldom venturing out of sight of land, even in the time of *Augustus* (*a*); the mere *perils of the sea* must therefore have been to them very inconsiderable. So that, whether we contemplate the *extent* of the *Roman* maritime commerce, or the *perils* to which it was exposed, we may reasonably conclude that it did stand much in need of the protection of insurance.

Some, however, have fancied that they could discover in the *Roman* history, the first traces of this contract.—*Livy* relates, that during the second *Punic* war, certain contractors employed to transport ammunition and provisions to *Spain*, stipulated that the republic should indemnify them against such losses as might be occasioned by the enemy, or by tempests in the course of the voyage, "*Impetratum fuit, ut, quæ navibus imponerentur ad exercitum Hispaniensem deferenda, ab hostium tempestatisque vi, publico periculo essent* (*b*). Others rely on a passage in *Suetonius*, who relates that the emperor *Claudius*, in a

(*a*) Vid. *Huet, Commerce des Anciens*, ch. 46. s. 9, 10, 11.
(*b*) *Liv.* Hist. lib. 23. n. 49.

time

time of scarcity at *Rome*, in order to encourage the importation of corn, took upon himself all the loss or damage that might be occasioned by storms and tempests in its passage thither. *Negotiatoribus certa lucra proposuit, suscepto in se damno, si quid per tempestates accidisset, et naves, mercaturæ causâ, fabricantibus, magna commoda constituit* (*a*). Some years afterwards, contractors, who had been employed to convey provisions to the armies serving in the provinces, were prosecuted for having set up pretended shipwrecks as a ground of charge, the republic having taken such losses upon itself: *Publicum periculum erat à vi tempestatis, in iis quæ portabantur ad exercitus* (*b*).

But these instances only serve to shew, that the contractors were to transport the stores purchased of them to the places of their destination, at the risk of the republic. They have scarcely a resemblance in any one particular to the contract of insurance, and are to be looked upon merely as a mode of encouraging private persons to supply the demands of the public. Upon no better authority, however, than the above passage in *Suetonius*, has *Malyne* roundly asserted, that *Claudius* had introduced the custom of insurance, 'whereby', says he, 'the danger and adventure of goods is divided, re-parted, and borne by many persons;—to the end that merchants might augment their traffic, and not adventure all in one bottom to their loss and overthrow (*c*).' The same author adds, that 'this custom coming to the knowledge of the inhabitants of *Oleron*, was recorded by them, and set down for a law, to be observed by all the sea-coast towns of *France*.' And yet there is not a word in the laws of *Oleron*, nor in those of *Wisbuy*, or of the *Hans-Towns*, as collected by *Malyne* himself, which has the most distant allusion to insurance.

A passage in one of *Cicero*'s letters is also adduced, as a proof that the *Romans* were acquainted with this contract.—Having gained a great victory in *Cilicia*, and obtained considerable spoils there, he wrote to the *proquæstor*, or under treasurer, *Canninius Sallust*, at *Laodicea*, in these

(*a*) *Suet.* ch. 18.——(*b*) *Liv.* lib. 25, n. 3.——(*c*) Lex merc. 103.

words: "*Laodiceæ me prædes accepturum arbitror omnis pe-*" *cuniæ publicæ, ut et mihi et populo cautum sit sine vecturæ* "*periculo* (*a*)." From this *Emerigon* (*b*) would infer an order to the proquæstor to contract with persons who should be answerable for the risk of sending this money by sea to Rome. But the sense of the passage by no means warrants this inference. On the contrary, it seems that *Cicero* only meant to acquaint the *proquæstor*, that he would have the money at *Laodicea*, and there take security for its being paid at *Rome*, without any risk, either to himself or the republic. If this be the right interpretation of *Cicero*'s words, it seems to bear a much stronger affinity to the practice of remitting money by means of *bills of exchange*, than to that of insuring against the perils of the sea.

There is in the pandects, an observation of *Ulpian*, which affords greater colour for supposing that the contract of insurance was not altogether unknown to the *Romans*, than any of the passages above referred to. He says, "*Illa stipulatio, decem millia salva fore promittis?* "*Valet* (*d*)." This passage shews, however, that the contract alluded to, whatever it might have been, was very little known at the time *Ulpian* wrote, since he thought it necessary to observe that *it was not illegal*.

Growth of maritime commerce.

As maritime commerce, when carried to a certain extent, must, as has been already observed, draw after it the contract of insurance; and as the growth of the one must necessarily induce a corresponding improvement in the principles of the other, we will here take a cursory view of the progress of commerce from its revival in *Europe* in the 12th century, to the period of its attaining its present greatness.

The causes which contributed to its revival.

During the dark ages which succeeded the fall of the *Roman* empire, down to the twelfth century, all was *Gothic* barbarism in the west of *Europe*. Science, literature, commerce, were things unknown or wholly neglected. The transient gleam which shed its influence on this country during the reign of the immortal *Alfred*, affords

(*a*) *Cic.* Ad Fam. 2. 17.——(*b*) Pref. 4.——(*d*) Dig. l. 45. de verb. oblig.

but

but a limited and temporary exception to this melancholy truth. Many causes at length contributed to revive the spirit of commerce, and renew the intercourse between nations.

The crusades. The crusades, about the close of the eleventh century, opened a vast communication between *Europe* and the *East*. *Constantinople*, the capital of the *Eastern* or *Greek* empire, had escaped the ravages of the northern barbarians who had overthrown that of the *West*. It was still a great and commercial city, where the elegancies of polished life yet remained; and this became the place of general rendezvous for the christian armies on their way to *Palestine*, or on their return from thence. And though the object of these expeditions was conquest, and not commerce, and though the issue of them proved unfortunate to these romantic and infatuated warriors, their commercial effects were beneficial and permanent. The crusaders brought back with them a taste for the refinements and luxuries of the *East*; and this soon created a demand, which could only be supplied by an extensive commerce with those parts.

Discovery of the mariner's compass. The close of the holy war was followed by the invention of the mariner's compass, or at least its introduction into *Europe*, about the year 1260. This, with the consequent improvements in navigation, opened a wide field for maritime enterprize. (*a*)

The erecting of corporations. The feudal system, which had been established in all the western parts of *Europe* by the northern conquerors, had, about this time, attained its greatest height, and the overgrown power of the nobles, its natural concomitant, while it held the great body of the people in slavery, controuled, or gave law, even to the sovereign himself. To create some power that might counterbalance that of these potent vassals, it became the policy of the monarchs of *Europe* to erect communities, or corporations, in the considerable towns, with exclusive jurisdiction, and privileges which might protect the inhabitants from servitude, or dependance upon the neighbouring barons, or any other than the sovereign himself. This expedient was first

(*a*) Vid. *And.* hist. com. vol. 1. p. 144.

adopted

adopted by *Lewis the Gross*, about the beginning of the 12th century; and though an ancient *French* author calls it a new and wicked device to procure liberty to slaves, and encourage them to shake off the dominion of their masters (*a*), yet the effects of this measure soon justified the policy by which it was dictated. The towns became the asylum of the oppressed; the acquisition of liberty produced a spirit of industry; and commerce soon began to establish an intercourse between the different nations of *Europe*.

Commerce of the *Lombards*.

The free states of *Italy*, which arose out of the ruins of the western empire, sought, by the arts of peace, to raise themselves to that eminence which others had obtained by arms and conquest. During the 12th and 13th centuries, the commerce of *Europe* was almost entirely in the hands of these *Italians*, more generally known in those ages by the name of *Lombards*, of whom companies or factories settled themselves in almost every state in *Europe*, where they became the only considerable merchants and bankers, and in those times rivalled even the *Jews* themselves in the arts of usury. One of these companies settled in *London*, from which *Lombard-street*, in that capital, took its name. The rival republics of *Venice* and *Genoa*, at this time, took the lead in commercial adventure. They brought the rich productions of *India* at first by a northern circuit, through the *Caspian Sea* to *Astracan*, and from thence by the *Black Sea* to *Europe*. The *Venetians* afterwards, having obtained permission from the *Pope* to trade with the infidels, and from the *Calif* of *Egypt*, the liberty of trading on the coasts of *Egypt* and *Assyria*, opened a more direct communication with *India*, the trade of which they now wholly engrossed, and continued the most powerful maritime state in *Europe*, till the *Portuguese* doubled the *Cape of Good Hope* in 1497, and established an uninterrupted communication by sea between *Europe* and the *East Indies* (*b*).

Insurance supposed to have been invented in *Italy*.

As the maritime commerce of these *Italian* states appears to have been carried to a very considerable extent

(*a*) Vid. *Hume* Hist. *Eng*. vol. 2. p. 118.——(*b*) *Huet, Commerce des Anciens*, ch. 48. s. 13. p. 311.

about

about the end of the 13th century, it is extremely probable that insurance came into use in *Italy* about that time. From thence, after the benefits resulting from it came to be understood, it was transplanted into most of the countries where the *Lombards* had established their trading companies. According to *Malyne* (*a*), they introduced it into *England* somewhat earlier than into the neighbouring countries on the continent; and, as a proof of this, he says, that even *Antwerp*, in its meridian glory, borrowed insurance from *England*, and that, down to the time in which he wrote (1622), there was in every policy made at *Antwerp*, and other places in the *Low Countries*, a clause inserted, that it should be in all things the same as policies made in *Lombard-street*, in the city of *London*, the place where the *Lombards* and other merchants of *London* used to hold their meetings, before the *Royal Exchange* was built.

Anderson (*b*) says, that the vast commerce carried on about the middle of the 16th century, between *England* and the *Netherlands*, introduced the practice of insuring from losses by sea, by a joint contribution. But the preamble to the stat. 43 *Eliz.* c. 12. which was passed in 1601, distinctly states, that it had been an *immemorial usage* among merchants, both *English* and foreign, when they made any great adventure, to procure insurance to be made on their ships or goods adventured. From this it may reasonably be supposed, that insurance must have been in use in *England* long before the middle of the preceding century. When introduced into *England*.

But while the *Lombards* were successfully cultivating their commerce in the south of *Europe*, the same spirit began to manifest itself in the north; and about the middle of the 13th century, the cities of *Lubec* and *Hamburgh* opened a trade with the *Lombards*. These, however, were soon obliged to enter into a league of mutual defence against the piracies of the *Danes*, *Swedes*, and other barbarous nations surrounding the *Baltic*. The benefits resulting from this confederacy, soon induced other towns to solicit to be admitted into it; and in a short time, eighty of the Commerce of the *Hanseatic* League.

(*a*) Lex. merc. 105.——(*b*) Hist. com. vol. 2. p. 108.

most

most considerable cities of *Germany* and the *Netherlands* were received into this alliance, which took the name of the *Hanseatic League.* They supplied the rest of *Europe* with naval stores, and established in several towns a staple, in which their commerce was regularly carried on, under the protection of this powerful confederacy. *Bruges*, in *Flanders*, was the most considerable of these. It became the centre of communication between the *Lombards* and the *Hanseatic* merchants, and the great emporium for the merchandize of the *East* and *West*. The *Flemings* traded with both in that city. This infused into them a habit of industry, which, while they retained their ancient free institutions, rendered *Flanders* the most opulent, the most populous, and the best cultivated country in *Europe*.

Commerce of the *Flemings*.

Measures of *Edward* III. to introduce the woollen manufacture into *England*.

Edward III., upon going into *Flanders*, preparatory to his first invasion of *France*, about the year 1340, was struck with the flourishing state of these provinces, of which he soon discovered the true cause, and endeavoured to excite a similar spirit of industry among his own subjects, who, blind to the advantages of their situation, and ignorant of the source from which opulence was destined one day to flow into their own country, neglected his wise admonitions; nor would they even attempt those manufactures, the materials of which they furnished to these foreigners. The King, however, encouraged *Flemish* artizans to settle in his dominions; and caused many wise laws to be made for the encouragement and regulation of trade, particularly the stat. 11 *Ed.* III. c. 2. by which all persons were prohibited from wearing any woollen cloth but of *English* fabric. By this he gave a beginning to the woollen manufactures of *England*, and first turned the active and enterprising genius of his people to those arts which have raised this country to the first rank among commercial nations.

Petition against the *Lombards*.

The *Lombards*, however, still engrossed the whole of the carrying trade with *England*. Some attempts were made by parliament, in the reigns of *Edward* III. and *Richard* II. to encourage *English* shipping, but without effect; for we find, that in the 18th year of *Henry* VI. the

the commons petitioned, that no *Italian*, or other merchants, of the countries beyond the streights of *Gibraltar*, should sell here any other merchandize than that of the countries beyond those streights. And the reason assigned for the regulation thus prayed, was, that the *Italians* had become the carriers, not only of the commodities brought from the countries within the streights, but also of those from the countries without the streights, which were not brought in such abundance, nor sold so cheap, as when they were brought by the merchants of the countries from which they came. They prayed, therefore, that this might pass into a law for ten years; but the King did not consent to it (*a*). At length, however, by stat. 1 *Rich.* III. c. 9. great restraints were laid, both upon these *Italian* merchants, and their commerce.

Their commerce restrained.

But, beside the disadvantage of having almost all the foreign commerce of *England* carried on by strangers, even the internal trade of the country was continually checked in its growth, or wholly restrained, by the rapacity and bad policy of the government, either by enormous and arbitrary impositions, or by grants of monopolies, which for ages operated as a constant discouragement to industry and ingenuity, till by the stat. 21 *J.* I. c. 3., monopolies were declared to be "*contrary to the ancient and fundamental laws of the realm.*"

English trade checked by impositions and monopolies.

It may be recollected also, that *England*, from the time of the conquest, down to the time of *Henry* VII., was almost constantly engaged in foreign or domestic wars. The arts of peace were, during that time, exiled, as it were, from this country, and so remained, until they found in the comparative tranquillity of the reign of that cautious prince, a degree of protection, under which they began to acquire some portion of strength and stability.

Two great events also, which happened in this reign, gave to the reviving spirit of commerce, a new and extraordinary impulse. While the *Portuguese* were creeping along the western coast of *Africa*, and slowly and cautiously exploring a passage by sea to *India* by the east, *Columbus*

Discovery of *America* and the passage by sea to the *East Indies*.

(*a*) Vid. *Reeves*'s hist. of shipping, p. 12. 15.

conceived

conceived the project of sailing thither by the weſt, and, in the attempt, diſcovered the *Weſt Indies* and the vaſt continent of *America*, in the year 1492. The *Portugueſe* ſtill perſevered, and, in the year 1497, atchieved their great deſign. *Vaſques de Gama* doubled the *Cape of Good Hope*, and opened a paſſage by ſea to *India*, *China*, and *Japan*. *Europe* now emerged out of that darkneſs in which ſhe had been involved from the ſubverſion of the *Roman* empire. The arts awoke from a ſlumber of 12 centuries; and ſo vaſt a field for foreign diſcovery and commercial enterpriſe was now opened to the view of the maritime ſtates of *Europe*, that the thirſt of military glory, ſo long predominant, ſoon gave place to the avidity of wealth, and a paſſion for adventure in the newly diſcovered regions. Colonization followed, and the *Engliſh* ſoon formed valuable ſettlements in the *Eaſt* and *Weſt Indies*, and on the continent of *America*.

Flemiſh commerce ruined by *Philip* II.

The *Flemings*, however, ſtill retaining their ancient free inſtitutions, were yet the firſt commercial people in *Europe*. Their induſtry, their manufactures, their foreign trade, ſtill ſecured to them a high degree of wealth and proſperity, when all was overthrown by the bigotry and tyranny of *Philip* II. Many of the perſecuted fugitives forſook their country and joined their fellow ſufferers in the *Batavian* moraſſes; and, with them, under the illuſtrious heroes of the houſe of *Orange*, bravely vindicated their liberties, and finally triumphed over their oppreſſors.

Transferred to *England* and *Holland*.

Many alſo ſought an aſylum in *England*, encouraged and protected by the wiſe and beneficent policy of *Elizabeth*. To both countries they carried their induſtry and their uſeful arts; and thus was laid that ſolid foundation of commercial greatneſs and maritime ſtrength to which *England* and *Holland* afterwards attained; and which, in this kingdom, have ſince been carried to a height unparalleled in the hiſtory of mankind.

Marine law.

The growth of maritime commerce in *Europe*, of which I have rapidly traced the progreſs, muſt have been accompanied by a correſponding improvement in marine law. Several codes were formed by different ſtates; at firſt for the regulation of navigation, and for defining the authority of the maſters and other officers of ſhips, and the duty

and rights of the feamen; afterwards for the regulation of maritime contracts.

Rhodian law. The earlieft fyftem of marine law, of which we find any account in hiftory, was that compiled by the *Rhodians*, after they had, by their commerce and naval victories, obtained the fovereignty of the fea, about 900 years before the chriftian æra. *Cicero*, in his oration in favour of the *Manilian* law, fays of that people, "*Rhodiorum ufque ad noftrum memoriam difciplina navalis et gloria remanfit.*"

Whether their maritime code merited equal applaufe, we are now unable to determine, becaufe there is reafon to fuppofe that it has not been tranfmitted down to us; at leaft not in a perfect ftate. A collection of marine inftitutions, under the denomination of *Rhodian* laws, may be feen in *Vinnius*; but they bear evident marks of a fpurious origin (*a*). Some have fuppofed, that the *Rhodian* laws were adopted by the *Romans* during the firft *Punic* war, when they firft became a naval power. Others affirm, that they were incorporated with the *Roman* law, by *Juftinian* and others (*b*). Perhaps the more probable conjecture is, that different parts of thefe laws were, from time to time, adopted by that people, as the neceffities of their marine required regulation.

As to the *Phœnicians*, the *Carthaginians*, the *Athenians*, the *Corinthians*, and other maritime ftates of antiquity, whether they had marine laws of their own inftitution, no where appears. If any fuch ever exifted, they have not defcended to our times.

Amalphitan code. The firft code of modern fea-laws was compiled about the time of the firft crufade, towards the end of the eleventh century, by the people of *Amalphi*, who had then become confiderable for their commerce and maritime power. It is not improbable, that this code confifted principally of the *Rhodian* inftitutions, which were found ftill in force in the countries bordering upon the *Mediterranean*; and being collected into one regular fyftem, were, for a confiderable time, generally received as law in thofe countries.

(*a*) Vid. *Emerig.* Pref. 3.—— (*b*) Vid. *Selden* de dominio maris, l. 1. c. 10. *Vinnius* in Peckium 190.

But

Consolato del mare.

But other states, as they grew into eminence, formed new collections of marine law, in which the old institutions were altered and modified to suit the improvements of the times, or their own particular interests. Great inconvenience was soon found to arise from this diversity of rules upon a subject that had long been regulated by one general system, which was looked upon as part of the law of nations. This made it necessary for the different maritime states to form a new code out of all these discordant materials; which was done, as *Grotius* informs us (*a*), by the authority of almost all the sovereigns of *Europe*. This new digest was denominated *Consolato del mare.* It was originally published by order of the ancient kings of *Aragon*, in the *Catalan* tongue, and therefore probably composed at *Barcelona*, the capital of that province, and of the kingdom of *Aragon*. In the thirteenth century, this code was received as law in *Italy*, the *Greek* empire, *France* and *Germany* (*b*); and *Vinnius* says, that most of the marine laws in *Spain*, *Italy*, *France*, and *England*, are borrowed from it (*c*). *Casaregis* says of it, *Consulatus maris, in materiis maritimis, tanquam universalis consuetudo habens vim legis inviolabiliter attenda est apud omnes provincias et nationes* (*d*). So that it seems to have been considered as a branch of public law; and though not quite unexceptionable in some respects, its regulations are still of very high authority in every maritime state in *Europe*.

Laws of *Oleron.*

The collection of sea-laws, next in point of time, as well as of celebrity, is that of *Oleron*, which, according to the *French* writers, were digested in the island of that name, under the title of *Roole des jugemens d'Oleron*, by direction of Queen *Eleanor*, the wife of *Henry* II., in her quality of duchess of *Guienne*, and afterwards enlarged and improved by her son *Richard* I. (*e*). But *Selden* denies this, and maintains that these laws were compiled and promulgated by *Richard* I., as King of *England* (*f*.) They are inserted in the beginning of the book entitled

(*a*) *Grot.* De jure bel. lib. 3. c. 1. §. 5. n. 6.——(*b*) *Emerig.* Pref. 6.—— (*c*) *Vinnius* Leg. Rhod. p. 190.—— (*d*) *Casaregis*, Disc. 213. n. 12.—— (*e*) *Cleirac*, p. 2. *Emerig.* pref. p. 11.—— (*f*) *Selden de dominio maris*, c. 24.

Ut

Us et coutumes de la mer, with a very excellent commentary on each section by *Cleirac*, the learned editor.

The next collection which occurs in *Cleirac*, is that of the ordinances made by "*the merchants and masters of the* "*magnificent city of Wisbuy*," in the island of *Gothland*, anciently much celebrated for its commerce, now an obscure and inconsiderable place. The true date of the promulgation of this code is not certainly known. *Malyne* (*a*) says, that the laws of *Oleron* were translated into *Dutch* by the people of *Wisbuy*, for the use of the *Dutch* coast. By *Dutch*, I presume, he means *German*; and it cannot be denied that many of the regulations contained in the laws of *Wisbuy*, are precisely the same as those which are found in the laws of *Oleron*. The northern writers pretend, however, that they are more ancient than the laws of *Oleron*, or even the *Consolato del mare*. *Cleirac* treats this notion with great contempt, and declares that, at the time of the promulgation of the laws of *Oleron* in 1266, which was many years after they were compiled, the *magnificent city of Wisbuy* had not yet acquired the denomination of a town (*b*). Be this as it may, these laws were for some ages, and indeed still remain, in great authority in the northern parts of *Europe*. '*Lex Rhodia navalis*,' says *Grotius*, '*pro jure gentium, in illo mari Mediterraneo vigebat*; '*sicut apud Gallium leges Oleronis, et apud omnes transrhenanos, leges Wisbuenses*' (*c*).

Laws of Wisbuy.

With respect to insurance, though it is purely a maritime contract, and would naturally find a place in the marine code of every country where it is in use; yet not the least mention of it is found, either in the *consolato del mare*, or in the laws of *Oleron*. In the laws of *Wisbuy*, indeed, according to *Cleirac*'s version (*d*), are these words,——

'*Si le maistre est contraint de bailler caution au bourgeois* '*pour le navire, le bourgeois sera pareillement tenu bailler caution pour la vie du maistre.*

'*C'est à dire que, contre les hazards de la mer et de la mort,* '*il ne peut echoir de requisition raisonnable à bailler caution;*

(*a*) Collection of Sea Laws, p. 44.—(*b*) *Cleirac*, p. 3.——
(*c*) *Grotius* de jur. bel. lib. 2, c. 3.—(*d*) Art. 66.

'*regulierement*

'*regulierement le bourgeois doit risquer son bien, et le maistre* '*sa liberté et sa vie, bien y peut estre fait polisse d'asseurance.*'

But this last paragraph, which alone alludes to insurance, seems to be only a comment upon, or exposition of, the foregoing, rather than a part of the original text; and its not being contained in *Malyne*'s translation of the laws of *Wisbuy*, strengthens this remark.

Ordinances of the *Hanseatic League.*

In 1597, the deputies of the *Hanseatic League*, in a general assembly at *Lubeck*, drew up a system of laws relating to navigation, for the use of their confederacy, to which, in 1614, in an assembly at the same place, they added several new ordinances. In these regulations, though the contract of bottomry is mentioned, there is not a word on the subject of insurance.

Ordinance of Louis XIV.

But the completest and most comprehensive system of marine law, is the famous ordinance of the marine, of *Louis* XIV., published in 1681. This excellent code was compiled and arranged by a very masterly hand, under the inspection of *Colbert*, the celebrated minister of that prince, upon an attentive revision of all the ancient sea-laws of *France* and other countries, with the assistance of the most learned men of the time, and upon consultation with the different parliaments, the courts of admiralty, and the chambers of commerce in *France*. It forms a system of whatever experience and the wisdom of ages had pronounced to be most just and convenient in the marine institutions of the maritime states of *Europe*. And though it contains many new regulations, suggested by motives of national interest, yet it has hitherto been esteemed a code of great authority upon all questions of maritime jurisprudence. Lord *Mansfield*, who appears to have taken much pains to obtain the best information, and to possess himself of the soundest principles of marine law, and of the law of insurance, seems to have drawn much of his knowledge upon these subjects from this ordinance, and from the elaborate and useful commentary of *Valin*. This may be perceived in many of his judgments upon questions of insurance, though his lordship does not always think it necessary to cite his authority.

Law of Insurance.

The law of insurance is considered as a branch of marine law, and was borrowed by us from the *Lombards*, who

who first introduced the use of this contract into *England*. It is also a branch of the law of merchants, being found in the practice of merchants, which is nearly the same in all the countries where insurance is in use; and, indeed, merchants themselves were, for a long time, the only expounders of it. The law of merchants not being founded in the institutions, or local customs of any particular country, but consisting of certain principles which general convenience has established, to regulate the dealings of merchants with each other in all countries, may be considered as a branch of public law. *Non erit alia lex Romæ, alia Athenis, alia nunc, alia post hac; sed et omnes gentes, et omni tempore, una eademque lex obtinebat* (*a*).

Law of Merchants.

Beside the general law of merchants, there are certain usages which prevail in particular countries, and sometimes in particular branches of commerce. These, like local customs in *England*, have the force of law where they prevail; and, where they are in force, are always supposed to be in the contemplation of the parties; and the contract of insurance is construed as having been made with reference to them. But then they must appear to have been long established; that is, as I humbly apprehend, they must be immemorial, or at least coeval with the branch of commerce to which they belong (*b*). They must also be reasonable and legal; otherwise no notice can be taken of them in any court of justice.

Particular usages.

If it be asked where the law of insurance is to be found; the answer is, in the marine law, and in the custom of merchants, which may be collected, 1. From the ordinances of different commercial states; 2. From the treatises of learned authors on the subject of insurance; 3. From judicial decisions in this country, and others professing to follow the general marine law and the law of merchants.

1. *Particular ordinances* have, as we have already seen, been made in many countries upon the subject of marine law; and many have been made to regulate marine insurance. But these have seldom gone farther than to

Ordinances relating to insurance.

(*a*) *Cic. Off.* 3.—(*b*) But see *Noble* v. *Kennoway, Doug.* 492. post ch. 7. s. 5.

 define,

define, and to sanction by legislative authority, those principles which were already received as law in all commercial countries. Some, indeed, have added regulations, dictated only by national policy or particular interest; but these are wholly disregarded elsewhere.

The ordinances of other countries are not, it is true, in *force* in *England;* but they are of *authority*, at least as expressing the usage of other countries upon a contract which is presumed to be governed by general rules, that are understood to constitute a branch of public law. *Non habent vim legis, sed rationis.*

Of *Barcelona*. The earliest ordinance now extant on the subject of insurance, is that of *Barcelona*, which, though without a date, must, from circumstances disclosed in it, have been published about the year 1435. *Emerigon* fixes the period of its publication in 1484 (*a*). But this is probably incorrect; for after the crowns of *Aragon* and *Castile* were united by the marriage of *Ferdinand* and *Isabella* in 1465, *Catalonia*, of which *Barcelona* is the capital, became subject to the laws of the united kingdom, and from that time no laws were promulgated as from that city.—It appears that this was not the first ordinance published on this subject; for it recites, that '*whereas in times past* '*but few ordinances of insurance have been made, this defect* '*requires amendment*, &c.'

Of *Florence*. The next ordinance on this subject was published at *Florence* in the year 1523, after that city had been raised to a high degree of commercial greatness by the wisdom and abilities of the family of *Medicis*.

Of *Charles V.* and *Philip II.* The Emperor *Charles* V. in 1551, published a number of regulations concerning maritime commerce, called the *Caroline* code, to which his son *Philip* II. added several new ordinances in 1563 and 1565.

Beside these, several other states, and even particular cities, in more modern times, have promulgated their respective codes of marine law, and regulations of insurance. Most of these will be found collected in the second volume of *Magens*, to which, in the following work, we shall have frequent occasions to refer. But in the

(*a*) *Emerig.* Pref. 12.

celebrated

celebrated ordinance of the marine of *Louis* XIV. above alluded to, will be found the best and most complete system of *positive law* for the regulation of insurance that has yet appeared in any country. It must, however, be observed, that many of the regulations contained in this ordinance were dictated by national interest, and are contrary to the general law upon the subject.

In *England*, where the practice of insurance has been the most extensive, fewer positive laws have been made to regulate it, than in any other country; and hence the practice of it with us has been found most conformable to general principles and the usage of trade. Some few statutes have passed, from time to time, to restrain the abuses of insurance, but no law has yet been made, either to ascertain any old principle, or to sanction any new one. This may be accounted for, not by supposing, with a learned writer on the law of insurance, that this law was already well settled, and its principles understood in most of the neighbouring commercial countries, before the use of it became extensive in *England* (a); but because the law of merchants is considered as a branch of the common law (b), and therefore the custom of merchants, in any one particular, being once clearly ascertained in any of the supreme courts, acquires from thenceforth the force of law, without the sanction of any higher authority. It would therefore have been an useless labour for the legislature to enact those very usages, by positive law, which are already considered as part of the law of the land. Besides, what is or is not the custom of merchants is much better ascertained in the investigation of particular cases, in courts of justice, than it could be by parliament, with all the information and assistance it could obtain. *Of England.*

Magens, indeed, wonders that the legislature had not laid down some complete system of regulations concerning insurances; and yet he acknowledges, "that whenever a trial at law takes place between an insured and an insurer, the wisdom and impartiality of the judges, in summing up the evidence, and directing the jury, leaves

(a) Vid. *Millar* on Insur. p. 12.—(b) *Winch.* 24.

no room to doubt that the verdict will be according to right and equity (*a*)." Still, however, he seems to have conceived a strong desire to have "a grand system of marine jurisprudence" erected in this country, and it is probable that he meant himself to have been the principal architect. But he appears to have been unable to engage those at the head of the government to enter into his views, and he peevishly tells us, that 'it seems to be the common maxim 'of those who sit at the helm in these kingdoms, when 'things are not very urgent, to leave merchants to agree 'among themselves, and work on.' A person less fond of erecting new systems might say, perhaps, that he could not have given a better proof of their wisdom.

Foreign treatises. 2. As to *treatises*, the earliest now extant on the subject of insurance is that entitled *Le Guidon de la mer*, which is found in the collection of marine institutions, published at *Rouen*, in 1671, by *Cleirac*, under the title of *Les us et coutumes de la mer* already mentioned. This work is evidently the production of a much earlier period than that of its publication by *Cleirac*; and yet its contents plainly shew that it could not have been written till after the practice of insurance had become pretty general, and most of the principles which govern it were ascertained and well understood. We may therefore reasonably conclude that it could not have been written long before the 15th century. *Cleirac* informs us, "that it was originally composed for the use of the merchants of *Rouen*, and is so complete in itself, that it fully explains all that it is necessary to know on the subject of marine contracts and naval commerce; and that nothing is wanting to it but the author's name." Many faults which had crept into it, through time and the carelessness of copiers, have been corrected by the editor, who has enriched the whole by a very learned and excellent commentary of his own.

Le Guidon.

Cleirac.

Valin. *France* has, in more modern times, produced three very valuable treatises on the subject of insurance. *Valin*'s commentary on the ordinance of the marine is of the highest value upon every topic of maritime law. On the branch which relates to insurance, his commentary is

(*a*) *Magens*, Pref.

clear,

clear, acute, and instructive. *Pothier*, in his treatise on contracts, unites the most profound learning with the purest morals and the most comprehensive judgment. That upon insurance, is neat, concise, and masterly. *Emerigon*, whose work is confined to the subject of insurance, unites great learning with great practical knowledge. It abounds, however, in those nice distinctions and metaphysical refinements, in which most of the foreign jurists seem to pride themselves. But he had some apology for this in a country where, according to his own account, at the time he wrote, the generality of men paid little regard to their contracts, if, by a quirk or a subtilty, they could evade the performance of them. Many points in *Emerigon* are merely hypothetical; many of them are those which had been submitted to him for his opinion as a lawyer, or his decision as an arbitrator. Still his book is, of all the foreign publications on this subject, the most useful to an *English* lawyer. *Pothier.* *Emerigon.*

Many other publications on this subject have appeared in different countries, and in different languages, the most considerable of which are those of *Roccus*, *Casaregis*, *Locennius*, *Bynkershoek*, and *Santerna*. To these we shall have frequent occasion to refer in the course of the present work.

It is not a little singular, that in *England*, where the practice of insurance has long been so extensive, so little was published on this important subject, till within the last twenty years. *Malyne*, *Molloy*, *Beawes*, *Postlethwaite*, and some others less worthy of notice, have each in their respective publications, given a short chapter or two on the subject of insurance. Mr. *Magens*, a merchant, in 1755, republished in two volumes quarto, his *Essay on Insurances*, which he had before published in *German* at *Hamburgh*. The essay itself occupies but a small portion of the first volume. It shews, however, a considerable degree of practical knowledge of marine insurance, derived from the ordinances, of different countries: But the book would have been much more valuable had the author been better acquainted with the general treatises on this subject. The rest of the work consists of a number of calculations of averages, *English authors.*

of letters and state papers relating to commerce, a collection of marine and commercial ordinances, treaties of commerce, and other matters, which are often of great utility. Mr. *Weskett*, a merchant, has, in a sort of alphabetical arrangement, put together a large quantity of materials on the subject of insurance, together with a variety of other matters little connected with insurance. Mr. *Millar*, a learned advocate of the *Scotch* bar, published at *Edinburgh*, in 1787, the *Elements of the law relating to insurances*, in which he discovers great knowledge of his subject, derived both from foreign and *English* books. To Mr. *Park*, the profession of the law and the commercial world are much indebted for his *System of the law of insurances*. This work professes, however, to be only "a collection of cases and judicial opinions," without any comments of the author's own (*a*).

Judicial decision.

3. With respect to *judicial decisions*, none are considered as binding authorities in our superior courts, but such as have been there determined; and even these may be re-considered; and if, upon a full examination, they are found to militate against any clear and indisputable principal of law, they may, as in other cases, be overruled. As to foreign decisions, though they are of no authority in our courts, yet some few will be found cited in this work, in order to shew, upon doubtful points, how learned men in other countries have understood the principles of that law, which is supposed to be in force in this. *Valent pro ratione, non pro introducto jure.*

At what time actions on policies were first brought in the courts of Westminster.

Though foreign commerce increased considerably in the reign of Queen *Elizabeth*, and insurance probably increased in a like degree, yet it appears to have furnished but few subjects of litigation in the courts of *Westminster*, till towards the close of that reign. The first case upon insurance which we find in any book of reports is mentioned by Sir *Edward Coke* (*b*), and he notices it as a mere novelty.—The reason why so few actions at common law were brought on policies of insurance before

(*a*) Vid. Advertisement to his 5th edition.——(*b*) 6 Rep. 47, b.

the

the above period, is very distinctly set forth in the preamble to the stat. 43 *Eliz.* c. 12. which recites, that 'Whereas heretofore assurers have used to stand so justly 'on their credits, that few or no controversies have arisen 'thereupon; and if any have grown, the same have, 'from time to time, been ended and ordered by certain 'grave and discreet merchants, appointed by the Lord 'Mayor of *London*, as men, by reason of their experience, 'fittest to understand, and speedily to decide, those 'causes.'—It further recites, that, '*of late years*, divers 'persons have withdrawn themselves from that arbitrary 'course,' and have sought to draw the parties assured, to 'seek their monies of every several assurer, by suits commenced in her Majesty's courts, to their great charges 'and delays.'

Ancient mode of settling disputes.

From this recital it appears that, before the passing of that act, almost all disputes arising upon contracts of insurance, were settled and adjusted by arbitration, and without resorting to any legal proceedings. And there seems to have been a particular tribunal for such arbitrations established in *London*, composed of persons annually appointed by the Lord Mayor, in imitation of some such establishments in other countries. *Malyne* informs us that there was an *Office of assurances* in the west side of the *Royal Exchange*, where insurances were made, and to which belonged certain commissioners who were annually chosen, and who were probably the '*grave and discreet* '*merchants*' alluded to in the above recital.

The same author adds, that the authority of these commissioners was confirmed by act of parliament, in the latter time of Queen *Elizabeth*, 'for the obtaining whereof,' says he, 'I have sundry times attended the committees of 'the said parliament, by whose means the same was enacted; not without difficulty, because there were many 'suits in law by action of *assumpsit* before that time, 'upon matters determined by the commissioners for assurance, who, for want of power and authority, could 'not compel contentious persons to perform their ordinances; and the party dying, the *assumpsit* was accounted 'to be void in law.' (*a*)

(*a*) *Mal.* Lex. merc. 106.

From

The court of policies of insurance erected.

From this it is plain that the decisions of the commissioners did not give entire satisfaction in all cases; and either the underwriters began to decline their jurisdiction, and so drove the insured to seek their remedy by actions at common law, or the insured themselves began to prefer that mode of proceeding. But be this as it may, the novelty was thought a great grievance, and the more so, as a separate action was brought against each underwriter; so that it was thought expedient to give a check to this practice, and therefore the statute we have just mentioned, 'gives 'power to the Lord Chancellor to award, under the great 'seal, a commission to be renewed yearly, for the determining of causes arising on policies of insurance entered 'in the office of insurances in *London*; to be directed to 'the Judge of the Admiralty, the Recorder of *London*, 'two doctors of the civil law, two common lawyers, 'and eight discreet merchants, or to any five of them, 'who are empowered to hear and determine all such 'causes in a summary course, without formalities of proceeding; and to bring parties before them, examine 'witnesses, and enforce their decrees by imprisonment 'of the parties disobeying them.' From these decrees, however, an appeal is given by bill in chancery.

43 *Eliz.* c. 12.

Its powers enlarged.

This seems to have been little more than a confirmation of the authority assumed by the commissioners of the *Office of Assurances*, with a grant of the power of enforcing their decrees. But it happened in this, as in most cases where it has been attempted to innovate upon the modes of administering justice prescribed by the common law, that this new jurisdiction was found defective in many respects; and therefore the stat. 13 & 14 *C.* II. c. 23. which was made to supply those defects, provides, 'that '*three* instead of five commissioners, (of whom a doctor 'of the civil law, or a barrister of five years standing, 'shall be one), may act; that they shall have power to 'punish witnesses for wilful delay; to direct admiralty 'commissions to issue for the examination of witnesses 'beyond sea; to enable one commissioner to examine 'witnesses going to sea before a court can be summoned, 'notice being given to the adverse party.'

But

But with all these additional powers, the court did not long continue to exercise its functions, and soon fell into disuse. (*a*) To this many causes contributed ;—1. Its jurisdiction being confined to such insurances only as related to *merchandize*, the court could not proceed in a case upon any other species of insurance (*b*), and the parties, in such case, were obliged to resort to the courts of common law..—2. It was determined, how properly it is not now necessary to enquire, that it was no bar to an action on a policy in one of the courts of *Westminster*, to alledge that the plaintiff had before sued the defendant, for the same cause, in the court of policies of insurance, and that his suit was there dismissed (*c*). And it is not a little singular, that though this was decided in the year 1656, before the stat. 13 & 14 *C.* II., the framers of that act made no provision to remedy a defect that must sooner or later prove fatal to the jurisdiction of the court.—3. It was doubted whether its jurisdiction was not confined to suits brought by the insured against the insurer; and whether it could afford any relief upon a complaint made by the latter against the former (*d*).—It has been said also, that the jurisdiction of the court was confined to such causes only as arose in *London* (*e*).—It is true, that the power given by the act is, 'to hear and determine 'causes arising on policies of assurance, such as are now, 'or hereafter shall be, *entered* in the office of assurances 'in the city of *London*.' But we learn from *Malyne* (*f*) that in this office all policies were registered *verbatim*, to the end that if a policy should be lost, the insured might not be without evidence of the contract; so that it would seem that the object of the above clause was not to confine the jurisdiction of the court to policies *made* in *London*.

Fallen into disuse.

(*a*) So completely forgotten is this court, that after every enquiry I could make at the different offices in the city, I have been unable to discover where it was held, or whether any records of its proceedings yet remain.——(*b*) R. *Bendyr* v. *Oyle*, *Sty*. 1 6, 172.- (*c*) *R. Came* v. *Moy*, 2 *Sid*. 121.—(*d*) *Delbye* v. *Proudfoot*, 1 *Show*. 396.——(*e*) *Park*, Introd. 45.—— (*f*) Lex merc. 115.—

But,

But, beside the defects of jurisdiction in the court, and the constant partiality of *Englishmen* for the common law forms of judicature, another cause, appearing on the face of the statute itself, must have, in some degree, contributed to its downfal. The act directs 'that the commissioners shall, once in every week at least, meet and sit 'upon the execution of the commission; *and that no 'person, by virtue of the act, might claim or exact any fee, 'for any matter or cause concerning the execution of the commission.*' With such a clause in the act, it will not be wondered, if the judges and officers of this court did not attend it, with the requisite punctuality, for the dispatch of business. Indeed it would seem, from an observation of Mr. Justice *Twisden*, in the case of *Suister* v. *Cool*, (*a*) that the proceedings in this court, 'where *no forms of proceeding were to be observed*,' were even more dilatory than in the courts of *Westminster*.—It is remarkable, too, that the stat. 6 G. I. c. 18. which authorizes the establishment of the two insurance companies, expressly provides that all actions on the policies of these companies shall be brought in the courts of *Westminster*; which shews that, at that time, the court of policies of insurance was already fallen into disuse, or, what is more probable, that it was fallen into disrepute, and that those who promoted these establishments thought it for their interest to oust that court of all jurisdiction in suits upon their policies.

Common law courts.

From this time, it may be reasonably supposed, that all suits on policies of insurance were brought in the courts of common law; and yet but few questions on this subject appear to have been determined in the courts of *Westminster* before the middle of the last century. Whether this arose from the number of insurances in *England* being inconsiderable, compared to what it has since become, or from the parties being still in the habit of settling their differences by arbitration, or from both these causes united, it is not now easy to determine. This, however, is certain, that after some of the decisions of the courts of *Westminster*, upon questions of insurance, came to be generally

(*a*) 2 *Keb.* 930.

known,

known, the confidence which the justice, impartiality, and ability of those courts inspired throughout *Europe*, soon induced the merchants of all countries to prefer *English* insurances to those of any other country. Even our enemies, in time of war, were not afraid to rely on *British* justice, and they still continued to cause the greatest part of their insurances to be effected in *London*, such insurances being for a long time most unaccountably tolerated by the *British* government (*a*).

During the time when Lord Chief Justice *Lee* presided in the court of King's Bench, many questions upon policies of insurance came before him which were chiefly decided at *Nisi prius*, but upon such just and sound principles, that very few of them afterwards came before the court for reconsideration. Lord C. J. *Lee*.

Upon Lord *Mansfield*'s succeeding to the same high office, on the death of Sir *Dudley Ryder*, he soon found a considerable influx of business to the court of King's Bench, arising, in a great measure, from the celebrity of his own talents. A great increase of insurances, not only upon *British* commerce, but likewise upon that of other countries, produced, about this time, a number of causes upon this subject, to which it became necessary for him to turn his particular attention; and indeed he seems to have taken pleasure in the discussion of questions arising upon this contract, in which, more, perhaps, than upon any other subject, he displayed the powers of his great and comprehensive mind. From the books of the common law very little could be obtained: but upon the subject of marine law, and the particular subject of insurances, the foreign authorities were numerous, and in general satisfactory. From these, and from the information of intelligent merchants, he drew those leading principles, which may be considered as the common law of the sea, and the common law of merchants, which he found prevailing throughout the commercial world, and to which almost every question of insurance was easily referable. Hence the great celebrity of his judgments Lord *Mansfield*.

(*a*) See this subject fully considered *inf.* ch. 2. s. 1.

upon

upon such questions, and hence the respect they commanded in foreign countries (*a*).

Many great and important questions in the law of insurance have occurred since Lord *Mansfield's* time, the decision of which proves that neither the learning or the talents of the judges of *Westminster Hall*, have been diminished since he retired from it. Nothing, indeed, in the history of the present reign, affords a stronger proof of his Majesty's paternal regard for the welfare and happiness of his people, and of his care of public morals, than the choice of the persons who have been appointed to fill the high judicial offices in the courts of *Westminster*.

Before I conclude these remarks, I feel myself called upon to acknowledge the many valuable illustrations which this work has derived from the decisions of the present very accomplished judge of the High Court of Admiralty; decisions which reflect much honour on our name and nation, and will be contemplated with applause and veneration as long as depth of learning, soundness of argument, enlightened wisdom, and the chaste beauties of eloquence hold any place in the estimation of mankind.

Sir *William Scott.*

(*a*) Of this there cannot be a better proof than the following:—*Emerigon*, though not altogether free from national prejudices, after giving an account of the decision of the court of King's Bench, in the case of *Lavabre* v. *Walter*, concludes with these words;—'*On ne sauroit s'empêcher d'admirer cette maniere 'de procéder, quelque éloignée qu'elle soit de nos mœurs; car l'im- 'pression que fait la vertu sur nous est si forte, que nous l'aimons 'jusques dans nos ennemis mêmes.*' (This was written in 1781.)— Tanta vis probitatis est, ut eam in hoste etiam diligamus. Cic. de amicitia, c. 9. '*Les juges en Angleterre ne croient pas, que 'ce soit assez de bien faire; ils donnent les motifs de leur decision, 'afin qu'on sache qu'on est soumis á l'empire de la loi, plutot qu á 'l'autorité de l'homme.*' *Emerig.* vol. 2, p. 67.

CHAP. II.

Of the Parties to the Contract.

IN treating of any contract, the parties to it are necessarily the first subject of consideration. These, in the contract of insurance, are, as has been already said, the insured and the insurer. Our business in the present chapter, will therefore be to enquire,

I. *What persons may be insured;*
II. *What persons may be insurers.*

Sect. I.

What Persons may be insured.

Vid. c. 3. s. 3, 4.

IN this country, all persons, whether *British* subjects or aliens, may, in general, be insured. The principal, if not the only exception to this rule is, the case of an *alien enemy*.

Whether an alien enemy may be insured.

It was long a disputed question, whether, in point of *policy*, the insurance of the property of the enemies of the state, in time of war, ought to be tolerated. This question has, more than once, been agitated in Parliament. In the year 1741, a bill was brought into the House of Commons to prohibit insurances on the ships and effects belonging to the subjects of *France*, then at war with *Great Britain*. The arguments of Sir *John Bernard* against the policy of such a restriction, though answered by Sir *Robert Walpole* and others, by arguments much more cogent and satisfactory, seem to have had greater weight upon that occasion than they merited; for though the bill was committed, it was afterwards dropped (*a*). In the year 1748, however, a bill was again brought in, to prohibit the insurance of the ships and merchandize of the subjects of *France*, during the con-

Such insurance occasionally restrained by statute.

(*a*) Vid. Parl. Deb. published in 1742, Vol. 2. p. 459.

tinuance

tinuance of the war with that country. And, though this was ſtrenuouſly oppoſed by Sir *Dudley Ryder* and Mr. *Murray*, then attorney and ſolicitor general, upon what they conſidered to be principles of policy and expedience, yet it paſſed into a law (*a*). A ſimilar law has been made by the ſtat. 33 *G.* III. c. 27. ſ. 4. which not only declares ſuch inſurances to be void, but alſo ſubjects the parties concerned in them to three months impriſonment; ſo that, to judge by the opinion of the legiſlature, the *policy* of ſuch a prohibition ſeems to be now pretty well eſtabliſhed.

Whether at common law ſuch inſurance be valid.

Still, however, theſe reſtrictions being only temporary, it will be proper to enquire how the law ſtands, independently of them.

In every declaration of war is implied a prohibition of all the King's ſubjects to trade with the enemy; or, by the intervention of friends or allies, to convey to them ammunition, proviſions, or any kind of ſuccour. This, it would ſeem, comprehends, alſo, a prohibition to inſure the effects of the enemy, whether in their own ſhips or in thoſe of neutrals. For, to inſure their property, is in effect, nearly the ſame thing as to trade with them.

Opinions of foreign writers.

All the foreign writers agree that this contract cannot be lawfully made between the ſubjects of ſtates at war with each other. *Bynkerſhoek*, who has written a chapter on this very queſtion (*b*), condemns ſuch inſurances as being contrary both to law and good policy. After defining inſurance, he ſays, '*Præmiſi quemadmodum aſſecuratio ſit definienda, ut vel ex definitione conſtaret, rationem*
'*belli omni modo exigere, ne naves, ne merces, ne alia hoſtium*
'*bona liceat aſſecurare. Hoſtium periculum in ſe ſuſcipere, quid eſt aliud quam eorum commercia maritima promovere.—Juſtiſſimum id videri poterat, quia in ſingulis belli indictionibus quiſque tantum hoſtibus damni inferre jubetur, quantum poteſt. Quod ſi ſit, etiam vetatur quoquo modo hoſtium utilitati conſulere. Id exigit jus belli generale. Sin*
'*ais, ex ejuſmodi aſſecurationibus, plus lucri quam damni*
'*ferre aſſecuratores, adeoque noſtris quam hoſtibus, plus pro-*

(*a*) Stat. 21 *G.* II. c. 4.—(*b*) Quæſt. jur. pub. lib. 1, c. 21. —Vid. *Le Guidon*, ch. 2, ſ. 5. *Pothier* h. t. n. 92.

deſſe,

'*desse, id ais, quod est incertissimum, & de quo vix ipsa ex-*
'*perientia judicare poterit, cum interim sit certissimum, sic*
'*hostibus causam præberi commercia sua latius promovendi.*
'*Quod, quia hostibus est utile, & fere redundat in nostram*
necem, omni ratione prohibendum est.'

Valin (*a*), after shewing that in *France* the insurance of enemy's property was contrary to the law of that country, observes, in language bordering a little upon derision, that the *English* did not consider the insurance of enemy's property as prohibited by a declaration of war:— 'For,' says he, 'they constantly, during the last war(*b*), 'insured our ships and cargoes, as in time of peace; 'whether they were destined for *France* or her colonies, 'or for the ports of her allies, or those of neutrals:' 'That, it is true,' adds he, 'did not prevent our ships, 'when taken, being declared good Prize; but the con-'sequence was, that one part of that nation restored to 'us, by the effect of insurance, what the other took from 'us by the rights of war.'

Reasons of policy against such insurance.

To this observation an *Englishman* might add, that in every contest between these rival nations, the naval superiority of *Great Britain*, if not counteracted, must, in a short time, ruin the commerce of *France*, provided it be not protected by *British* insurance. But, with that protection, the utmost they can suffer will be the loss of their premiums; and this will in all probability be more than compensated by the captures made by their own cruisers. Thus will this country lose one of the greatest benefits she can hope to derive from her maritime strength.

But whatever may be the policy of permitting such insurance, it seems that, till lately, a notion prevailed in this country, and which has been supported by constant pracice, that the insurance of enemy's property, when unre-

(*a*) *Valin* h. t. art. 3. p. 32. vid. *Pothier* h. t. n. 95.——
(*b*) *Valin* published his work in 1766, therefore the war he alludes to must be that which was terminated by the peace of Paris in 1763.

ſtrained by ſtatute, *was not illegal* (*a*); and the occaſional reſtraint of ſuch inſurance, from time to time by acts of parliament, has been fairly enough called in aid, to ſhew that ſuch was the opinion of the legiſlature, or that the queſtion was, at leaſt, doubtful when thoſe acts paſſed. This practice, after all, ſeems to have ariſen in *England*, rather from a notion of policy and expedience, than from any principle of law. Mr. Juſtice *Buller*, in delivering his opinion in the caſe of *Bell* v. *Gilſon* (*b*) ſays;—"In the years 1746 and 1747, Sir *Dudley Ryder*, Lord *Mansfield*, and other great men of that time, argued the queſtion entirely on its expedience, and held that it was good policy to permit inſurances on enemy's property. In later times, I well remember to have ſeen many policies tried, profeſſedly on enemy's property, without ever hearing the objection raiſed. Lord *Mansfield* did all in his power to prevent ſo diſhonourable a defence being made. When the caſe of *Giſt* v. *Maſon* (*c*) came on, I more than once converſed with Lord *Mansfield* on the ſubject, being deſirous to obtain his opinion on the legality of ſuch inſurances. On the *legality*, however, I never could get him to reaſon. He often ſaid, that in former times it was conſidered to be for the intereſt of the country to inſure enemy's property; and, on this perſuaſion he always *diſcountenanced* any objection on that head. But he never went beyond the ground of *expedience*. *At preſent*, I think ſuch inſurances are not expedient. The ſtate of the countries at war is ſuch as to make them otherwiſe."

Lord *Mansfield*'s ſentiments on this point.

From this ſtatement of the learned judge, it is evident that he himſelf doubted, at leaſt, of the legality of inſurances on enemy's property, and that the opinion which

(*a*) Vid. the opinion of Lord *Hardwicke* in the caſe of *Henkle* v. *Roy. Ex. Aſſ.* 1 Vez. 320. and that of Lord *Mansfield*, in *Planché* v. *Fletcher*, Doug. 241. and in *Giſt* v. *Maſon*, inf. 36.; alſo the arguments for the plaintiff in the caſe of *Briſtow* v. *Towers*, 6 T. R. 35.——(*b*) 1 *Boſ.* and *Pul.* 354. poſt. ch. 3. ſ. 4.——(*c*) 1 *T. R.* 84.

he fo anxioufly fought, and which Lord *Mansfield* feems fo ftudioufly to have withheld, was, that, *in point of law*, they were void; but that he thought the law of *England* was, in this refpect, impolitic or unwife.—Entertaining this opinion, it was certainly competent to him and Sir *Dudley Ryder, as members of parliament*, to argue againft the policy of the law, when the queftion was agitated *there*, whether thefe infurances fhould be reftrained by an exprefs ftatute or not; becaufe every member of parliament has an undoubted right to call in queftion the wifdom, or the policy, of any rule of law, when he oppofes the paffing of a bill which is meant to enforce the obfervance of it. But to avow or infinuate that it might, in any cafe, be proper for a *judge* to prevent a party from availing himfelf of an indifputable principle of law, *in a court of juftice*, upon the ground of fome notion of fancied policy or expedience, is a new doctrine in *Weftminfter Hall*, and has a direct tendency to render all law vague and uncertain. A rule of law, once eftablifhed, ought to remain the fame till it be annulled by the legiflature, which alone has the power to decide on the policy or expedience of repealing laws, or fuffering them to remain in force. What politicians call expedience, often depends on momentary conjunctures, and is frequently nothing more than the fine fpun fpeculations of vifionary theorifts, or the fuggeftions of party and faction. If expedience, therefore, fhould ever be fet up as a foundation for the judgments in *Weftminfter Hall*, the neceffary confequence muft be, that a judge would be at full liberty to depart to-morrow from the precedent he has himfelf eftablifhed to-day; or to apply the fame decifions to different, or different decifions to the fame circumftances, as his notions of expedience might dictate. Indeed the learned judge himfelf has given us an inftance of this; for he fays, that *in the then war*, he thinks the infurance of enemy's property *would not be expedient*; and yet he informs us, that Lord *Mansfield* was of opinion that it was for the intereft of the country, *in his time*, to encourage it.

Gist v. Mason, 1 T. R. 84.

If a policy be not illegal on the face of it, the court will not grant a new trial, to let in the defendant to shew by evidence that the insurance was upon a trading with the enemy.

In the case alluded to by Mr. Justice *Buller*, the court avoided the general question, by refusing a new trial, which would have enabled the defendants to prove the fact of trading with the enemy.—That was an action brought to recover the premiums upon several policies of insurance, underwritten by the plaintiff for the defendants, who were *West India* merchants, and had acted as their own brokers in getting these insurances effected. —Upon the trial of the cause, it appeared, that the defendants had property in the *West India* islands, at the time they were captured by the *French* during the *American* war; that it was a constant practice to supply these islands with provisions from *Ireland*, notwithstanding they were in the hands of the enemy; and that, in this trade, the defendants had employed neutral vessels, which they caused to be insured from different parts of the continent, to *Ireland*, *Madeira*, and *Saint Thomas's*, with liberty to go *to any one of the captured islands.*—On the part of the defendants, it was contended at the trial, that these voyages were illegal; and as both parties were in *pari delicto*, the maxim of law, *melior est conditio possidentis*, ought to prevail.—But Lord *Mansfield*, being of opinion that these policies were not illegal *on the face of them*, directed a verdict for the plaintiff.—In his address to the jury, he said,—" It is for the benefit of this country to permit these coutracts upon two accounts; the one because you hold the box, and get the premiums, at least as a certain profit; the other, because it is a certain way of obtaining intelligence of the enemy's designs; and I have known instances of intelligence procured by such methods (*a*)."—The defendants afterwards moved for a new trial, to let them into evidence to prove the nature of this trade, which was so notoriously illegal, that the plaintiffs must have known it to be so. And, as an excuse for not offering this evidence at the trial, it was said that it had been omitted on a presumption that the jury, of their own knowledge, must have concluded that

(*a*) This address to the jury does not make a part of the case in the Term Reports, but is taken from *Park*, 242.

the illegality of these contracts was known to the plaintiff at the time he underwrote the policies. But the court refused to grant a new trial. Lord *Mansfield* said,—"This, *upon the face of it*, is the case of a neutral vessel; and it is no where laid down, that policies on neutral property, though bound to an enemy's port, are void. And indeed I know no cases that prohibit, even a subject, trading with the enemy, except two; one a short note in *Roll's* Abridgment (*a*), where trading with *Scotland*, then at war with *England*, was held to be illegal; and the other was a note, which was given me by Lord *Hardwicke*, of a reference in King *William*'s time to all the judges, on the question, whether it was a crime at common law, to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanour. By the maritime law, trading with an enemy is cause of confiscation in a subject, provided he be taken in the act; but this does not extend to a neutral vessel."

Reasons against the policy of permitting the insurance of enemies' goods.

Upon this case it will be sufficient to observe, that even the arguments of policy urged by Lord *Mansfield* are by no means satisfactory. The profit arising from these insurances is far from certain; nor does it appear that they are likely to afford intelligence of the enemy's designs, without affording them, at the same time, the means of obtaining much better intelligence of ours. Every person concerned in these insurances must be under a strong temptation to convey to the enemy all such information as may put them upon their guard, at least, against attacks meditated against their trade; whereas the parties insured have no motive of interest to disclose the designs of their own government.—Independently, therefore, of the general question of the illegality of holding commerce with the king's enemies, it cannot reasonably be supposed that the law would tolerate a contract which has so strong a tendency to betray a number of persons into a breach of their allegiance. But, be this as it may, two cases occurred while Lord *Kenyon* presided in the court of King's Bench, in which, though it was not expressly

(*a*) 2 *Rol.* Ab. 173.—Vid. case of the *Hoop*, 1 *Rob.* Adm. Rep. 196.

determined that ſuch inſurances are illegal, it was decided, that no action can be maintained on any policy, at the ſuit, or on the behalf, of an alien enemy, at leaſt during the war, whether the inſurance be made before or after the commencement of hoſtilities, and though the goods inſured be of *Britiſh* manufacture, and ſhipped before the war began.

Brandon v. Neſbitt, 6 T. R. 23.

An alien enemy cannot maintain an action on a policy on goods, though they were ſhipped before the war commenced. Nor can his agent maintain the action, though a creditor of the inſured for more than the ſum inſured.

The firſt of theſe caſes was an action on a policy upon goods on board the *Greyhound*, an *American* ſhip, effected before the paſſing of the ſtat. 33 *G.* III. c. 27 (*a*). "at and from *London* to *Bayonne*."—It was averred in the declaration, that the policy was effected on account of certain perſons therein named, who were intereſted in the goods, and that the ſhip was captured by the *Engliſh*. '—The defendant pleaded, *firſt*,—That the perſons intereſted were aliens, born in *France*, within the allegiance of the *French* King; that before the ſhip ſailed, a war broke out between the King of *Great Britain* and the perſons exerciſing the powers of government in *France*; that the perſons intereſted were inhabiting and commorant in *France*, under the government there; and that they were enemies of our King, and adhering to his enemies,' &c.—*Secondly*, 'That the defendants were *living in France*, and enemies of the King; and that the goods were ſent from *London*, after the commencement of the war, for the purpoſe of being landed in *France*, and delivered in a courſe of trade to the King's enemies.'—To the firſt of theſe pleas, the plaintiffs replied,—'That the perſons intereſted were indebted to them in more than the value of the goods inſured; and to the ſecond,—That the goods were not prohibited at the time when the policy was effected, and that they were ſhipped before the commencement of the war.'—Upon demurrer to each of theſe replications, the court gave judgment for the defendant, being clearly of opinion, that no action whatever could be maintained by, or on behalf of, an alien enemy.—Lord *Kenyon* ſaid, 'that the caſe of *Anthon v. Fiſher* (*b*), pro-

(*a*) Sup. 32.——(*b*) *Doug.* 648, 9, n.

ceeded

ceeded on the same principle; that there was no case in which the action had been supported in favour of an alien enemy; for though it was held in *Ricord* v. *Bettingham* (*a*), that the action by an enemy on a ransom bill might be maintained, the action was not brought till peace was restored."

Bristow v. *Towers*, 6 T. R. 35.

Neither can an action be maintained on a policy on the property of an alien enemy, though of *British* manufacture exported from hence.

In the other case it appeared that the plaintiff, as agent, in pursuance of directions for that purpose, caused an insurance to be made on accouut of *Arrouet* and others, subjects of *France*, on goods, consisting of *British* manufactures, shipped on board the *Nancy*, an *American* vessel, on the 19th of *March* 1793; that previous to the insurance and shipping of the goods, general reprisals were granted against *France*, and an embargo laid on all foreign vessels, except those belonging to states in amity with the king, not having naval or military stores, or any other prohibited articles on board; and that the ship having sailed on her voyage, was captured by the *English*, and the goods insured condemned as *French* property.—The court held clearly that this case could not be distinguished from the foregoing case of *Brandon* v. *Nesbitt*, and therefore gave judgment for the defendant.

Here, the insurance being on property belonging to persons who were in the situation of alien enemies at the time the policy was effected, afforded an opportunity of deciding the general question. But though the objection was made and fully argued, yet, according to the report of the case, the court expressed no opinion on that point, but gave judgment for the defendant, without stating any other ground than that it could not be distinguished from the case of *Brandon* v. *Nesbitt*.—But as the ground of the decision in that case was not, that the contract was *void*, but merely that an action could not be maintained at the suit of an *alien enemy*, the general question, whether any loss by *British* capture could be recovered upon an *English* policy, remained undecided till the following case came to be determined in the court of Common Pleas.

(*a*) 3 *Bur.* 1734, 1 *Bl.* 563.

Furtado v. *Rodgers*, 3 *Bos. & Pul.* 191.

No action can be maintained for a loss by *British* capture, though the policy was effected previous to the war, and the action brought after. But, *quære*, whether an action, in such case, might not have been maintained for any other loss.

An insurance was made in *October* 1792, on the ship *Petronelli*, the property of the plaintiff, a *French* subject resident at *Bayonne*, "At and from *Bayonne* to *Martinique*, "and at and from thence back to *Bayonne*."—The ship sailed on the voyage insured in *October*, and arrived in *November* 1792 at *Martinique*, where she was unavoidably detained till *March* 1794; at which time, war having broke out between *France* and *England*, the ship, with many other *French* vessels, was, upon the capture of that island, taken by the *English*. At the time the policy was effected, *Great Britain* was in amity with *France*, and so continued until *February* 1793, when hostilities commenced between them.—In an action upon the policy, brought *after the cessation of hostilities*, to recover the loss by capture, the court unanimously determined in favour of the defendant.—Lord *Alvanley*, in delivering the opinion of the court, said, that the insurance of enemies' property was illegal at common law, for the reasons assigned by *Bynkershoek* and *Valin*, as cited above (*a*); that there is no material distinction between insuring enemies' property, and insuring against *British* capture; and that, though, by the terms of the policy, the underwriters engage to indemnify the insured against all captures and detentions of princes, without any exception of the acts of their own government, yet, that an exception of *British* captures must be implied in the contract, though the policy was effected before the commencement of hostilities (*b*); and that if an insurance were expressly made against such captures, it would be void by the law of *England*.—He added, that, in his opinion, the insurance was good against all other losses but that arising from capture by the *British* forces (*c*).

A short

(*a*) Sup. 32, 33.——(*b*) Vid. *Brewster* v. *Kitchell*, 1 *Salk.* 198. where Lord C. J. *Holt* held that if a man covenant to do a thing which is lawful, and an act of parliament come and hinder him from doing it, the covenant is repealed. Vid. *Dy.* 27. pl. 178.——(*c*) Upon this last point Lord *Alvanley* seems to have expressed his own opinion rather than that of the court. In the case of *Brandon* v. *Curling*, which will be mentioned

Nantes v. Thompson, 2 East 385. inf. ch. 16. s. 2.

Case of a recovery for a loss by *British* capture.

A short time previous to the decision of this case in the court of Common Pleas, that of *Nantes* v. *Thompson* was determined in the court of King's Bench.—It was an action on a policy on a foreign ship and goods, on a voyage from *Elsineur* to several ports in *Spain*; and it was stated in the declaration that the ship in the course of her voyage arrived in *Plymouth Sound*, and was there arrested and detained by order of His Majesty, and was afterwards condemned as *lawful prize* in the *High Court of Admiralty*. There was a demurrer to the declaration, assigning for cause that it was not stated on whose account the policy was made, or what persons were interested in the ship and goods insured.—But it was never objected, either at the bar or by the court, that this action was brought to recover a loss occasioned by *British* capture; and the plaintiff had judgment.

Kellner v. Le Mesurier, 4 East 396. inf. ch. 15. s. 3.

No action can be maintained to recover a loss by *British* capture.

A more recent case has occurred in that court in which a foreign ship, insured in the usual form, was stated to have been "*taken as prize by our Lord* "*the King*."—Upon demurrer to the declaration, one question was, whether an insurance made in *England* can operate as an indemnity against *British* capture.—The court determined that no action can be maintained to recover a loss by *British* capture.—Lord *Ellenborough* in delivering the opinion of the court, said, that an insurance against *British* capture, *eo nomine*, would be illegal and void upon the face of it (*a*).

Gamba v. Le Mesurier, 4 East 407.

French property insured in time of peace, is captured by the *English* upon war breaking out: An action will not lie, to recover for this loss, even after peace is restored.

So, where the plaintiffs, who were *French* subjects resident at *Dunkirk*, caused an insurance to be made in *London* on the ship *Æole* and goods on board, from *St. Domingo* to *Dunkirk*; and the policy was effected in *September* 1792, when this country was *in amity* with *France*. In *September* 1793, after hostilities had broke out between those countries,

tioned presently, Lord *Ellenborough* lays it down that, in every policy on alien property, there is an implied exception of all losses during the existence of hostilities between the respective countries of the insured and the insurers.

(*a*) In a subsequent case, (*Lubbock* v. *Potts*, inf. 43.) the same court held that this doctrine of Lord *Ellenborough* must be taken with reference to the case of a policy on a *foreign ship*, which could not be insured against capture, *in case of hostilities*.

tries, the *Æole*, with her cargo on board, was captured at *St. Domingo* by the *English* *After peace was restored*, an action was brought on the policy, to recover for this loss.—But, the court determined that this action, being brought to recover a loss by *British capture*, could not be maintained.

Brandon v. *Curling*, 4 *East* 410.

Goods purchased in *England* on account of *Frenchmen*, are shipped and insured before, but exported after, hostilities commenced between *Great Britain* and *France*, and are captured by a co-belligerent. —The insured cannot recover for this loss.

Even where goods, purchased in *London* for account of certain *French* subjects resident at *Bayonne*, were, in *January* 1793, shipped on board the *Greyhound*, warranted an *American* ship, and on the 21st of the same month insured on a voyage from *London* to *Bayonne*. On the 4th of *February* 1793, bills of lading were signed, and on the following day forwarded to the consignees at *Bayonne*. On the same 4th of *February* an embargo was laid on all *French* ships and property in the ports of *Great Britain*. On the 11th of *February* the ship sailed from *London* for *Bayonne*, having been first regularly cleared out for that voyage. On the 12th of *February* war was declared against *France*. In the latter end of *February* the ship was obliged to put into a port in *Spain*, and before she could proceed on her voyage to *Bayonne*, the cargo was seized by the officers of the King of *Spain*, then at war with *France*, and afterwards condemned as prize.—In an action on the policy to recover for the loss occasioned by this seizure and detention, the court determined that the plaintiff was not entitled to recover.—Lord *Ellenborough*, in delivering the opinion of the court, said, that in the foregoing cases of *Kellner* v. *Le Mesurier*, and *Gamba* v. *Le Mesurier*, it was the opinion of the court, that the general terms of insurance against capture in our policies, are to be understood as virtually containing *an exception of such captures as might eventually be made by his Majesty and his subjects*, and against which a *British* subject could not, consistently with his public duty, insure in direct terms; and, consequently, that wherever the generality of the terms of insurance might produce a similar contravention of public interest, they must be so construed as to exclude the particular event or peril which could not be made the subject of legal insurance in direct terms;

In every policy on alien property there is an implied exception of all losses, during hostilities between the respective countries of the insured and insurer.

terms; and, therefore, that an insurance on goods *generally*, must be understood with a proviso, *that it shall not extend to cover any loss happening during the existence of hostilities, between the respective countries of the insured and insurer* (*a*).

Lubbock v. Potts, 7 East 449.

It seems that British property may be legally insured against British capture, seizure, and detention; but that foreign property cannot be insured against British hostile capture.

In a subsequent case, after a ship and cargo had been insured from *Trinidad* to *Gibraltar*, at a premium of 20 guineas *per cent.*, to return 10*l.* for convoy; the underwriters, in consideration of a further premium of five guineas *per cent.*, agreed to insure "against all risks "whatsoever, *British capture, seizure, and detention included.*"—It was contended on the part of the underwriters, on the authority of what was said in *Kellner* v. *Le Mesurier* (*b*), that this memorandum extending the insurance to *British* capture, &c., vitiated the policy.—In answer to this it was alledged, that the memorandum was legal; for that *British* property might, through ignorance or wrong, be seized, captured, &c. by *British* ships of war, and loss and damage would thereupon ensue, though the property were afterwards liberated; against which loss the insured might lawfully contract to be indemnified.—The court seemed to concur in this opinion, and observed that what was said in *Kellner* v. *Le Mesurier* must be taken with reference to the case of a policy on a *foreign ship*, which could not be insured against *British* capture, *in case of hostilities.* They also seemed to think, that the memorandum might be construed to extend to protect the insured against losses arising from unlawful capture, &c. by *British* ships; or even from temporary lawful detention, without any fault of the insured; and that, taken in this sense, the memorandum would not vitiate the policy. But the cause was decided upon another point (*c*).

But a neutral, though residing in the enemy's country, and carrying on trade there, and even in partnership with an alien enemy, may insure his interest in the joint property.

(*a*) Vid. the case of *Furtado* v. *Rodgers*, sup. 40. in which Lord *Alvanley* declares it to be his opinion that, an insurance of foreign property is good against all other losses but that arising from capture by *British* forces.——(*b*) Sup. 41. inf. ch. 15. s. 3.—— (*c*) Vid. inf. ch. 3. s. 2.

Rotch v. Edie, 6 T. R 413. *inf.* ch. 12. f. 5.

A neutral refiding in the enemy's country, and carrying on trade there in partnerfhip with an alien enemy, may infure his own intereft in the joint property.

As, where an infurance was made on the half of a fhip, &c. " at and from *L'Orient* to the fouthern whale fifhery."—In an action brought to recover a lofs by the detention of the *French* government, it appeared that the infured was a fubject of the *United States of America*, and had formerly refided feveral years in *London*, but for fome years previous to the making of the infurance in queftion, had dwelt at *L'Orient*, and was jointly concerned in the fouthern whale fifhery, with *M. Berard*, a native of *France*, refident at *L'Orient*, but their interefts were infured by feparate policies, effected by feparate agents. The plaintiff, fhortly before making the infurances in queftion, came to *England*, and returned to *France* previous to the commencement of hoftilities with *Great Britain*; and, having remained there about four months, returned again to *England*, and continued to refide there from that time.—It was infifted on the part of the defendant, that, as the infured, at the time the infurance was effected, was domiciled, and carried on trade in *France*, and owed a temporary allegiance to the governing power of that country, the objection applied as ftrongly to his recovering, as if he were a natural born fubject of that country.—But the court determined, that the plaintiff, not being an alien enemy, but a native of *America*, and then refiding in *England*, was under no difability to fue in this cafe; and that the confequence of allowing this objection would be, to render it illegal to infure the property of neutrals in an enemy's port.

Sect. II.

What Perfons may be Infurers.

Underwriters.

INSURANCE is a fpecies of game which requires great prudence and circumfpection in thofe who are engaged in it as underwriters. They fhould be expert in analyfing rifks and calculating probabilities; in forefeeing the dangers of the fea, and the danger of fraud. They fhould be able to form a found judgment by combining all circumftances, and comparing them with the rate of premium. To form fuch a judgment, in many cafes requires

great

great sagacity, penetration, and experience. But if men possessing all these advantages are sometimes deceived, what must be the situation of those who, allured by the desire of gain, blindly put their signatures to every policy that is presented to them, without considering the precipice to which their temerity leads them. A wise underwriter will judge for himself, and not implicitly follow others who may have subscribed before him, however remarkable for sagacity and experience (*a*).

Character of the *French* underwriters.

In *France*, underwriters, if we may credit some of the best authors of that country, were never remarkable for their readiness to do justice to the insured. They are accused of resorting to captious exceptions and fraudulent subterfuges to elude the payment of their losses (*b*). *Assecuratores plerùmque differendæ solutionis gratiâ, nodum in scirpo quærunt* (*c*).

Character of those of *England*.

With us, if there are a few underwriters who, under the guidance of ill advisers, sometimes set up unworthy objections, there are many who are the victims of their own good faith and easy credulity (*d*). The most cautious find it extremely difficult to escape the snares which knavery prepares for them. No wonder, then, if they are sometimes tempted to make captious exceptions, when it is considered that they can only see with the eyes of the insured; that, in general, they can only defend themselves by such papers, and other scraps of evidence as they can obtain from the same quarter; and that, with all the precautions they can employ, they often pay what they might justifiably dispute.

The two insurance companies erected by the 6 G. 1. c. 18.

At common law, any man, or company of men, might be insurers; and individuals, upon their own separate account, have still the same right.—But, it was supposed, or pretended, about the beginning of the last century, that

(*a*) *Pondere se i firmati possino essere delsino da indurre altri*, *Targa*, c. 52, n. 33.

(*b*) Vid. *Emerig*. vol. 2. p. 244. *On les a comparés aux femmes qui conçoivent avec plaisir, & qui enfantent avec douleur.* —— (*c*) *Straccha* gl. 29. n. 1. —— (*d*) *Modernis his temporibus, quibus fraudes à* NAVARCHIS *frequentius committuntur, digni potiùs miseratione censeri debent assecuratores, quam assecurati. Casaregis*, disc. 11, n. 3.

com-

commerce had suffered confiderably by perfons in infolvent circumftances underwriting policies of infurance; and having received large fums in premiums, becoming bankrupts, or otherwife failing in making good their loffes. To remedy this; but more, perhaps, to enable government to raife a fum of money by the fale of a monopoly, it was thought expedient to erect two companies for the purpofe of making marine infurances, with fuch funds to anfwer all demands on their policies, as might give confidence to fuch mercantile adventurers as were unwilling to depend on individual underwriters; ftill, however, leaving to merchants the option of infuring with fuch underwriters when they thought proper. To this end, the ftat. 6 *G.* I. c. 18. authorifed the King to grant charters to two diftinct companies or corporations for the infurance of fhips, goods and merchandizes at fea, or going to fea, and for lending money on bottomry. They were to be invefted with all the powers ufually granted to corporations, and the privilege of purchafing lands to the amount of 1000*l. per annum*. Each was to provide a fufficient capital, and a competent ftock of ready money, to anfwer all demands on their policies.

A charter granted to each, 22d of *June*, 1720.

In purfuance of the powers given by this act, the two propofed companies, the one called the *Royal Exchange Affurance*, and the other, the *London Affurance*, were eftablifhed by Royal charters, bearing date the 22d day of *June*, 1720.

All other companies are reftrained from infuring fhips and goods at fea, or lending money on bottomry.

But the moft important privilege granted by this act to thefe companies was the exclufive right of making marine infurances, and lending money on bottomry, as a *company or partnerfhip*, on a *joint capital*. For this purpofe the act (fect 12) declares that, 'during the continuance 'of thefe corporations refpectively, all other corporations 'then in being, or afterwards to be eftablifhed, whether 'fole or aggregate, and all focieties and partnerfhips for 'infuring fhips and merchandizes at fea, or going to fea, 'and for lending money on bottomry, fhall be reftrained 'from granting, figning, or underwriting, any policies 'of infurance upon any fhips, goods, or merchandizes, 'at fea, or going to fea, and from lending money on bottomry:

'bottomry: And that if any corporation or persons in 'partnership, (other than the said two companies), shall 'presume to grant, sign, or underwrite any such policy, 'or make any such contract of insurance, every such 'policy shall be *ipso facto* void; and all sums, so signed 'and underwritten, shall be forfeited, one moiety to the 'King, the other to the informer, who shall sue for the 'same in any of the courts of *Westminster*. And if any 'such corporation or partnership, (other than the said 'two companies respectively), shall lend, or agree to 'lend, any money on bottomry, the bond, or other secu-'rity for the same, shall be void, and such agreement 'adjudged to be an usurious contract, and the offenders 'shall suffer as in cases of usury. Nevertheless it is de-'clared, that any private or particular person or persons 'shall be at liberty to underwrite any policies, and en-'gage in any insurances, upon ships, goods, or merchan-'dizes, at sea, or going to sea, or may lend money on 'bottomry; so as the same be not upon account or risk 'of any corporation, company, or partnership.

And all policies made by any such company shall be void, and the sums underwritten forfeited.

And all bottomry bonds deemed usurious.

But the right of individual insurers continues as before the act.

The rights and privileges of the *East India* and *South Sea* companies, which they enjoyed before, are reserved and secured to them by this act, except as to the insurance of ships and merchandize.

The monopoly thus granted to these companies, was expected to prove so profitable that, as the price of it, each of them agreed to pay 300,000*l.* into the *Exchequer* for discharging the debts of the civil list. But (by § 15.) upon three years notice, at any time within thirty-one years, and repayment of the 300,000*l.*, each of these corporations might be determined by a vote of the House of Commons.

Consideration paid for this privilege.

How these companies may be dissolved.

And (by § 16.) it is provided that if, after the expiration of the thirty-one years, the king should judge the further continuance of these corporations to be hurtful or inconvenient to the public, he may, by letters patent, revoke or avoid them, without any inquisition or *scire facias* for that purpose. However, they very soon found, or pretended, that they had agreed to purchase this monopoly at too high a price; for, in the very next year, it appears by the stat. 7 *G.* I. c. 27. § 26., that

£188,750 of the quota of each company remained unpaid; and this sum, on account of the difficulties they were then supposed to labour under, was remitted to them.

Whether they ought to be suffered to continue.

As it is now become a maxim confirmed by the experience of ages, that every permanent monopoly is pernicious and hurtful to the best interests of the public, it is a question well worthy of the serious consideration of government, whether the continuance of these companies ought to be any longer tolerated. It requires no arguments to prove that it would be highly conducive to the interests of commerce, if underwriters were permitted to subscribe policies of insurance in their partnership names, and upon a joint capital.

Contracts made in derogation of the rights of the insurance companies are illegal and void.

So long, however, as these companies are suffered to retain this monopoly, the law will protect them in the enjoyment of it; and, therefore, contracts made in derogation of their rights will be deemed illegal.—Thus, the object of the 12th section of the act was, not only to restrain avowed partnerships from making insurances publicly in their partnership names, but also to secure to these companies the exclusive right of insuring ships and goods at sea, *as a company, upon a joint capital,* by making it illegal to employ any other joint stock in this species of insurance. And the following case will shew, that no contract arising out of any agreement made in derogation of this right can be legal or binding.

Mitchell v. *Cockburn*, 2 H. Bl. 379

A. and B. are jointly engaged in insurances in the name of A.; and A. pays more in losses than he receives in premiums, and both become bankrupts.—A.'s assignees shall not recover from those of B.; a moiety of the money thus advanced.

A. and B. who were jointly engaged in the business of insurance, which was carried on in the name of A., became bankrupts.—A. having paid much more for losses than he had received in premiums, his assignees brought an action against the assignee of B. to recover a moiety of the money thus advanced.—Upon the trial before Lord C. J. *Eyre*, the plaintiffs were nonsuited; his lordship being of opinion, that, this demand arising out of a partnership prohibited by the stat. 6 *G.* I. c. 18., no action could be maintained for it.—Upon a motion to set aside this nonsuit, it was contended on the part of the plaintiffs, that the object of the statute was to prevent a competition between the insurance companies and any other *open and ostensible partnerships*, which might gain credit

credit in opposition to the companies; but here only one individual appeared, on whose single security the insured relied.—But the court were unanimously of opinion that the nonsuit was right; for the provisions of the act would be at an end if a person, by insuring in his own name, could have the benefit of a joint capital, which the act expressly prohibits, though the party subscribing shall be estopped from setting up a secret partnership to defeat a *bonâ fide* insurance.

Sullivan v. *Greaves*, at N. P. after Eaft. 1789, *Park* 8.

A, an underwriter, pays a loss, and B. his secret partner pays his share to the broker for the use of A.:—A. cannot maintain an action to recover this money from the broker.

So, where an underwriter paid the whole loss upon a policy, and one *Bristow*, who had agreed to divide the risk with him, also paid his moiety to the broker.—The underwriter brought an action against the broker for this money, as being money received by him from *Bristow* to his use.—Lord *Kenyon*, who tried the cause, was clearly of opinion, that this was a partnership within the act of parliament; and held that the underwriter could not maintain an action against the broker to recover the moiety so paid to him by *Bristow*, and nonsuited the plaintiff.—"If," said his Lordship, "a single name appear upon the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a *bonâ fide* insurance, by saying to an innocent person, that there was a secret partnership between himself and another, so as to avoid the policy. But here the plaintiff is himself the underwriter, who comes to enforce an illegal contract: It is a partnership *pro hâc vice*; and this party cannot apply to a court to enforce a contract founded in a breach of the law."—No motion was made to set aside this nonsuit; and Lord *Kenyon*, some time after, took occasion to mention to the bar, that he had stated the case to the rest of the judges of the court, who all concurred with him in the opinion he had given.

Nor can the ostensible underwriter, on the ground that the partnership was illegal, recover from the broker the profits of such partnership insurances.

Upon the same principle which governed these two cases, it has also been determined that an action cannot be maintained on behalf of the ostensible underwriter, against the broker who managed the insurances of a partnership, to recover a balance in his hands arising from the profits of those insurances; even upon the ground

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that the partnership was illegal, and the ostensible underwriter the sole insurer.

Booth v. Hodgson, 6 T. R. 405.

A. B. and D. become partners as underwriters, in the name of A.—C. and D. receive the premiums as insurance brokers.—A. cannot disaffirm the partnership by insisting that he alone was the insurer, so as to recover from C. and D. the money received by them for A. B. and D.

Thus: A. and B. were partners, as merchants; and C. and D. were partners, as insurance brokers: A. B. and D. agreed to become partners as underwriters; but the name of A. only was to be used. Policies were, from time to time, subscribed in the name of A., sometimes by himself, sometimes by D., and premiums were received, which, (after deducting losses, &c.), amounted to £.2455 17*s.* 1*d.*—A. and B. employed C. and D. as brokers, to get insurances effected for them, and became indebted to them in £.2269 11*s*, 5*d.* for premiums.—A. became bankrupt, and his assignees brought an action against C. and D. to recover the above sum of £2455 17*s.* 1*d.* as money had and received by them to the use of the bankrupt.—Upon this case, the question for the opinion of the court was, whether the plaintiffs were entitled to recover the whole sum of £2455 17*s.* 1*d.* as the net profit of the insurances made in the name of A.; and if so, whether the defendants had a right to set off the £2269 11*s.* 5*d.*—It was insisted on the part of the plaintiffs, that, though the partnership between A. B and D. as underwriters was illegal and void, and to be laid out of the case, yet the insurances were not so; and it would be unjust, that, where the insured had had the benefit of the policies, the insurer should be liable to the risk, and yet not be entitled to the premiums; that as the money must be considered as actually received by the defendants as brokers for A. *only*, they ought not to object to paying it to his assignees on account of an illegal contract between him and others.—But the court were unanimously of opinion, that the plaintiffs were not entitled to recover any thing.—They said, that the object of the stat. 6 *G.* I. c. 18 was to protect the two companies from any competition with other companies formed into partnerships; and it enacted that all policies contrary to these provisions should be void; but, that it was only void as between the insurer and his secret partners, not as between him and the insured, who knew nothing of the partnership; that, as the plaintiffs, however, avowed that the bankrupt had insured in direct violation of the statute, and

as

as all their claims arose out of this illegal transaction, the law could give no effect to it; that, as to the money being received by the defendants to the use of A. only, that was an inference contrary to the fact; for they received it for the use of the partners in an illegal partnership; and, as between A. and his partners, the plaintiffs could not be suffered to disaffirm the partnership. They considered the foregoing cases of *Sullivan* v. *Greaves*, and *Mitchell* v. *Cockburne*, as clear authorities in favour of the defendants.

Though such contracts are void, as between the secret partners, they are not so, as between the underwriter and an innocent insured.

It is observable that though the statute declares that every policy subscribed by any other partnership than the two companies shall be *ipso facto* void; yet, in each of the three foregoing cases, it was distinctly declared that though these partnership contracts were void, as between the partners themselves, yet that, as between the underwriter and the insured, who knows nothing of the partnership, they are good and binding. This, indeed, must have been the meaning of the legislature. Therefore, if a single name appear upon the policy, the person who subscribed it shall never be allowed, if a loss happen, to defeat a *bonâ fide* insurance, by saying to an innocent person, that there was a secret partnership between him and another, so as to avoid the policy.

Aubert v. *Maze*, 2 *Bos.* and *Pul.* 371.

An arbitrator awards a balance due from one partner to another, upon joint insurances:—This part of the award is void.

The principle upon which these cases were determined has been since fully approved and confirmed, in a case which came before the court of Common Pleas, while Lord *Eldon* sat as chief justice there.—An arbitrator, after awarding that a sum of money was due from the plaintiff to the defendant, upon the balance of an account, proceeded thus: "And I also find and determine that the said plaintiff is further indebted to the said defendant in the sum of 680*l*. 2*s*., being one moiety of divers sums of money paid by the defendant, for and on account of losses on policies of insurance, underwritten by agreement between them, *at their joint risk, aud for for their joint benefit*;" and he accordingly awarded that sum to the defendant.—The arbitrator stated the specific ground of this part of his award for the express purpose of enabling the plaintiff to take the opinion of the court upon the legality of it; and a motion being accordingly

made with that view,—the court were clearly of opinion that the latter part of the award, being founded on the illegal partnership was void, and therefore set it aside (*a*).

But Insurances may be legally made upon a joint capital, provided each subscriber be not liable for the whole.

But the rigour of the principle which governed the court, in these decisions, seems to have been, in some degree, relaxed in the two following cases, in which it appears to have been the opinion of Lord *Kenyon*, and the court of *King's Bench*, that insurances may be legally made upon a joint capital, provided each subscriber to it be only liable to the amount of his subscription, and not each for the whole.

Harrison v. *Millar*, at N. P. after *Mich.* 1796, 7 T. R. 340. n.

A number of ship owners subscribe a sum proportioned to their shipping, to a common stock which becomes a fund for the payment of all losses:—As each individual is only liable for the sum he undertakes, and not each for the whole, the policy so underwritten is not illegal.

The first of these cases was an action on two policies of insurance on the *Ann* and *Elizabeth*, from *Dantzic* to *London*.—The plaintiff and defendant were members of the "*Whitby* Association," consisting of a number of persons, owners of ships, each of whom in proportion to his shipping, paid a certain sum, which formed the stock of the society. The policies were signed by all the members. They all became insurers for each other, according to the respective values of their ships; and when any loss hapened, the treasurer paid it out of the joint stock. The defendant's share of the present loss was 14*l*. Each individual was only liable for the sum he had undertaken.—On the part of the defendant it was objected, that the policies were void in law, as being against the stat. 6 *G*. I c. 18.—But Lord *Kenyon*, before whom the cause was tried, over-ruled the objection.—He said,—"This does not infringe on the act of Parliament, as the members of the association have only underwritten in their individual characters: But they cannot underwrite for themselves and partners. If all of them were liable to the extent of their whole stock, it would be illegal. At present the members of this association only stand as individual underwriters for small sums."

(*a*) Vid. *Watts* v. *Brook*, 3 *Ves*. jun. 312, in which the lord Chancellor allowed an account to stand, though some of the items allowed by the master, were upon partnership insurances. But see lord *Eldon*'s observations on this case, 2 *Bos*. & *Pul*. 374.

But

But in the other case it was holden that if the subscribers to such an association agree that, in case of the insolvency of any of the members, his share of any loss shall be made good by the other subscribers, the contract will be void; this being the very species of joint insurance which the statute meant to prohibit.

But an agreement that all shall make good the deficiency, if any become insolvent, is void.

As, where articles of agreement were executed by a number of persons, describing themselves to be owners, and part owners, of ships, who had agreed to become a company or society for the insurance of ships, and who covenanted with a trustee for themselves *severally*, and not jointly, that they would severally engage and bind themselves for the insurance of ships, and parts of ships, belonging to the several parties, along with their own several and respective parts of any ships, from the 1st of *June* 1787 for 21 years, subject to certain conditions and regulations, &c.; that in case of a total loss of any such ship, the subscribers covenanted *severally* to pay their respective proportions of the sum of 1000*l.* to the person who should have entered, and insured such ship; and one regulation was, 'That in case any member of the company should become insolvent, or unable to pay a proportionable part of any loss that might happen, *the proportionable part of such insolvent member should be made good by the other members*: and that all costs, charges, and expences of any action brought, or defended, by order of the committee, *should be borne and paid equally by the respective members*.'—In an action of covenant brought on these articles by one of the society against the trustee, the court of *King's Bench*, upon demurrer, determined that the action could not be maintained; the articles of agreement being void by the stat. 6 *G.* I. c. 18. s. 12.—Lord *Kenyon* said,—"The meaning of the legislature, in passing that act, was, that, as the two insurance companies were to have a monopoly up to a certain extent, in consideration of certain sums of money paid by them to the public, there should be no competition between them and any other public body; but that private individuals might still continue to insure on their own account: The

Lees v. *Smith*, 7 T. R. 338.

A company agree to insure each other's ships, and covenant *severally*, and not jointly, to pay in case of loss, in proportion to their respective shares; but in case of the insolvency of any, the others to make good the deficiency: —This is void.

case of *Harrison* v. *Millar* (*a*), seems to have been properly decided. There, each person undertook for himself only, according to the value of his own share: But here, in case of the insolvency of any one of the members, all the others were liable to make good his share of the loss: This was adding the credit of the rest of the members of the society, which was the very thing that the act intended to prevent."

(*a*) Sup. 52.

CHAP. III.

Of the subject matter of marine insurances.

HAVING ſhewn in the foregoing chapter what perſons may be parties to this contract, we now proceed to conſider the *ſubject matter* of it.

It is impoſſile to conceive a contract of inſurance, without ſuppoſing ſomething which is inſured, and which is the ſubject matter of ſuch contract.—Marine inſurances are commonly made on goods and merchandize, ſhips, freight, and bottomry loans. But there are certain articles, which, from motives of public policy, cannot be legally inſured in this country, and others which can only be inſured under particular reſtrictions. It will be the buſineſs of the preſent chapter to particularize theſe, and to ſhew by what laws, and under what circumſtances, the inſurance of them is regulated or reſtrained; and this we will do under the following heads, viz.

I. *Smuggled goods;*
II. *Prohibited commerce with the Britiſh colonies;*
III. *Contraband of war;*
IV. *Commerce with the enemy;*
V. *The wages and effects of the maſter and mariners;*
VI. *Freight.*
VII. *Slaves;*
VIII. *Profit.*

Sect. I.

Smuggled Goods.

In general it may be laid down as a rule, that no inſurance can be made on any ſpecies of goods and merchandizes, intended to be imported or exported, contrary to the laws of this kingdom, or thoſe of its dependencies, or

An Inſurance on prohibited commerce is void.

or to the law of nations; and that, if the intended commerce be contrary to any of these laws, an insurance made to protect it will be illegal and void. For the law would be inconsistent with itself, were it to give validity to a contract which is meant to protect a party from the risks attending an infringement of the law. The same principle prevails in all other maritime states; and foreign writers, particularly the *French*, lay it down as a rule, that the promise of the insurer, however generally expressed, will not comprehend the case of any commerce prohibited by the law of the place where the contract is made (*a*).

The insurer may take advantage of this objection, though he knew the trade to be illegal.

And, with us, this rule holds, even where the insurer is apprized of the nature of the trade: For though the objection, in such case, must always come with an ill grace from an insurer who has accepted the premium, and promised the indemnity; yet the courts are bound to allow the objection; not, indeed, for the sake of the insurer, but in obedience to the law, which is founded on general principles of policy, and, of which, by a sort of accident, the insurer is permitted to take advantage, contrary to the real justice of the case, as between him and the insured (*b*).

Opinions of foreign writers on this point.

Roccus does not seem to have understood that this objection was founded in *public policy*; for he considers it as a discharge of the insurer, only where he has had no *notice* of the illegality of the trade (*c*). But *Bynkershoek*, with more enlarged notions of jurisprudence, puts this matter

(*a*) Vid. *Roccus*, h. t n. 21. *Le Guidon*, ch. 2, art. 2 & 5, *Cleirac*, p. 233. *Valin* sur art. 49. h. t. p. 127. *Pothier*, h. t. n. 58. *Emerig*. tom. 1. p. 211. Vid. also *Molloy*, b. 2. c. 7. s. 15.——(*b*) Vid. Lord *Mansfield*'s judgment in *Holman* v. *Johnson*, *Cowp*. 343.——(*c*) "*Assecuratio facta, quantumvis generalis, non comprehendit res vetitas asportari; et quando dominus mercium assecuratarum devehi fecerit res prohibitas*, IGNORANTE ASSECURATORE, *cujus causâ pervenitur ad perditionem mercium vel navis,—non tenetur assecurator.*"—*Roccus*, h. t n. 21.—*Santerna*, part 4. n. 17. uses the same words, *ignorante assecuratore*.

upon

upon its true ground (*a*). He holds that the contract is void, though the goods inſured be expreſsly ſtated to be contraband.

By 4 and 5 *W.* and *M.* c 15. perſons *inſuring* the delivery of ſmuggled goods, and alſo the *inſured*, ſhall forfeit 500*l.*

But the mere illegality of the contract has, in many inſtances, been found inſufficient to prevent great frauds from being committed againſt the revenue, and againſt the prohibitory reſtrictions which, from motives of policy, are, from time to time, impoſed on different branches of commerce, by perſons who, for certain premiums, made it a practice to undertake, at their own riſk, to deliver ſmuggled and contraband goods into the warehouſes of the owners, free from duty; thus becoming, not only the carriers, but the *inſurers* likewiſe, of ſuch goods, even againſt the riſk of ſeizure and confiſcation. To remedy this evil, the ſtat. 4 and 5 *W.* and *M.* c. 15. ſ. 14. provides, 'That all perſons, who, by way of inſurance or otherwiſe, ſhall undertake to deliver any goods imported into *England*, without paying the duty, or any prohibited goods; or ſhall, in purſuance of ſuch inſurance or agreement, knowingly deliver any prohibited or uncuſtomed goods, ſhall, for every offence, forfeit 500*l.*, above all other forfeitures.'—The ſame penalty is impoſed on perſons who ſhall agree to pay for ſuch inſurance, or knowingly receive ſuch goods.—'And if the inſurer ſhall diſcover the ſame, he ſhall keep the inſurance money, be diſcharged from all forfeitures, and have half the penalties impoſed on the party inſured or receiving the goods. If the inſurer do not make ſuch diſcovery, the party inſured may do ſo, and he ſhall have back his inſurance money, and half the penalties impoſed on the inſurer, and be diſcharged from his own forfeitures.'—And the ſtat. 8 and 9 *W.* and *M.* c. 36. made for the encouragement of the ſilk manufacture, ſubjects all perſons guilty of delivering foreign alamodes and luſtrings to be *held to*

Encouragement to either party to inform againſt the other.

In ſome caſes the ſmuggler may be held to bail.

(*a*) "*Si vel nominatim expreſſum ſit* CONTRABANDA, *vel res hoſtiles, aſſecurari, ne ſic quidem aſſecuratorem teneri,* QUIA NULLUS EST CONTRACTUS, *et contractus qui nullus eſt, implere vel non implere, pendit a mera voluntate contrahentium. Quod autem meræ voluntatis eſt, in judicio defendi nequit.*" *Bynk.* quæſt. jur. pub. lib. 1. c. 21.

bail

bail for the penalties imposed by the above act of the 4 and 5 *W.* and *M.* c. 15.

Penalties for insuring the delivery of wool in foreign parts, or paying for such insurance.

In like manner, it became a practice with persons engaged in the clandestine exportation of wool from *Great Britain* to foreign parts, to insure the delivery of it to the consignee. To restrain this pernicious practice, the stat. 28 *G.* III. c. 38. s. 45 and 9. declares, 'That if any person by way of insurance or otherwise, shall undertake or agree that any sheep, wool, &c. shall be carried to parts beyond the seas, from any place within this kingdom; or, in pursuance of such insurance, shall deliver any wool, &c. in parts beyond the seas, such person, and all aiders and assistants, shall, upon conviction, forfeit 50*l.*, and suffer six months solitary imprisonment.' And (by § 46.) the like punishment is awarded against persons 'who shall pay, or agree to pay, for such insurance,' and the articles insured shall be forfeited. 'And (by § 47.) any persons concerned in such insurance, who shall inform against the others, shall be freed from all penalties, and be entitled to the things insured.'

When the insurance is on goods generally.

'And (by § 48.) all insurances on goods and merchandizes to be exported from *Great Britain* to foreign parts, which shall afterwards appear to be wool, &c. shall be void, notwithstanding any words or agreement inserted in the policy; and nothing shall be recovered for any loss or damage, or for the premium upon such insurance.'

Whether a trade prohibited in one country may be the subject of a legal insurance in another.

Whether a trade prohibited by the laws of one country may be the subject of a legal insurance in another, is a question upon which there has been some difference of opinion amongst writers on the law of insurance.— *Valin* (*a*) supports the affirmative, and says, that though an insurance on goods, the importation or exportation of which is prohibited by the laws of *France*, is void; yet, when the prohibition is by the laws of another country, if the insurer be apprised that the goods insured are contraband, he is bound by the contract: If he be ignorant of this, it is agreed on all hands that he would not be

(*a*) Art. 49. p. 127.

bound,

bound, for he could not be ſuppoſed to ſubject himſelf to the riſk of ſeizure and confiſcation, unleſs he had notice that the goods were contraband, and received a premium adequate to the nature of the riſk. In ſupport of this opinion he cites a ſentence of the admiralty of *Marſeilles* confirmed by an *arrêt* of the parliament of *Aix* of the 30th of *June* 1758, where the inſurance was upon raw ſilk meant to be ſmuggled out of *Spain*. This ſentence was founded upon a *conſultation*, or written opinion, of *Emerigon*, who labours to prove that goods may be inſured in *France*, which are contraband only with reſpect to foreign countries, provided they are not ſo by the laws of *France*. "The exportation of certain goods," ſays he, "may be prohibited by his *Catholic Majeſty* as ſtrictly as he pleaſes; but his laws are no rule of conduct for *Frenchmen*, who are unqueſtionably permitted in *France*, to import bullion, coin, ſilk, &c. from *Spain*, to ſupply our coinage, our manufactures, and our commerce." *Pothier* (*a*), who is generally ſwayed by purer moral ſentiments, combats this doctrine, and inſiſts that the grounds of it are falſe. His principal arguments are, that a man cannot carry on a contraband trade in a foreign country without engaging the ſubjects of that country to commit an offence againſt the laws, which it is their duty to obey; and it is a crime of moral turpitude to engage a man to commit a crime; that a man carrying on commerce in any country, is bound to conform to the laws of that country ſo long as he remains there (*b*); and, therefore, to carry on an illicit commerce there, and to engage the ſubjects of that country to aſſiſt him in ſo doing, is againſt good faith; and, conſequently, a contract made to favour or protect this commerce, is peculiarly unlawful, and can raiſe no obligation. —By way of reply to theſe arguments, *Emerigon* (*c*) ſays, that *Pothier* would not have been ſo rigid, if he had

(*a*) *Pothier*, h. t. n. 58.——(*b*) *Quare etiamſi peregrinus cum cive paciſcatur, tenebitur illis legibus quæ in ea civitate valent: quia qui in loco aliquo contrahit, tanquam ſubditus temporarius legibus loci ſubjicitur. Grot. jur. bel. lib.* 2. c. 11. ſ. 5.——(*c*) Vol. I. p. 212. 215.

considered

considered that smggling is a vice common to all commercial nations. That the *Spaniards* and *English*, in time of peace, practise it against *France*; and that the *French*, therefore, have a right, by way of reprisals, to do the same towards them; and this, he says, is supported, not by the *authority* of the law, but by the *evasion* of it.

So that, according to *Emerigon*, the *law* is conformable to *Pothier's* sentiments, but the *practice* agreeable to his own. The *morality* of the question is entirely on the side of the latter, though *policy*, perhaps, is on the side of the former. And yet it is difficult to conceive why, with states, as with individuals, honesty should not, in all cases, be deemed the best policy. Certain it is, that neither an individual nor a state can, upon any moral principle, justify the commission of a crime, in order to obtain satisfaction for a wrong done, still less for a wrong apprehended.

The law of *England* pays no regard to the revenue laws of other countries.

Be this as it may, the law of *England*, it is said, pays no regard to the revenue laws of other countries. And it must be confessed that even the legislature has, in one instance, plainly countenanced a contraband trade with foreign nations. The exception in the stat. 19 *G.* II. c. 37. s. 3. enabling persons who carry on a trade with the *Spanish* and *Portuguese* colonies to insure in the same manner as before that act, was evidently made to favour the smuggling of bullion from those places by persons, as *Emerigon* observes, who could obtain no bills of lading or other evidence of their cargoes (*a*).

A policy, therefore, will not be void, though the trade be a fraud against the revenue laws of a foreign state, and even contrary to a *British* treaty.

And this doctrine has been carried so far, that an insurance upon a a voyage, in which it was intended to defraud the revenue of a foreign state, was holden not to be illegal, though fictitious papers were fabricated for the purpose of facilitating this fraud (*b*). Nay, it has even been holden by a great and eminent judge, whose decisions are justly esteemed to be of the highest individual authority in questions of insurance, that even where the trade insured is to be carried on by *British* subjects, not

(*a*) See *Emerigon*'s observations on this clause of the *English* statute, vol. I. p. 212.——(*b*) R. *Planché* v. *Fletcher*, *Doug.* 238. *inf.* c. 8. s. 3.

only

only contrary to the laws of a foreign state, but contrary also to the express provisions of a treaty, to which *Great Britain* was a party; yet, if the insurer subscribe the policy, with full knowledge of the nature of the trade, the contract will bind him (*a*).

Lever v. Fletcher, at N. P. after Hil. 1780, Park 237.

Though the intention of the insured be to carry on a trade with the subjects of a foreign state, forbidden by the laws of that state; yet it will be lawful; and if known to the insurer, the policy will bind him.

Thus: A ship was insured, "At and from *London* to "*Pensacola* and *Manshac* in the river *Mississippi*, with li-"berty to touch at *Portsmouth* and *Jamaica*."—The ship was employed in the usual trade in the *Mississippi*, and traded at *Little Manshac*, in the island of *New Orleans* in the dominions of *Spain*. *Manshac*, the place mentioned in the policy, was part of the continent of *North America*, on that side of the river, which, by the treaty of *Paris* in 1763, was surrendered to *Great Britain*, and is about 37 leagues higher up than *New Orleans*. The loss was occasioned by a seizure of the ship at *Little Manshac* by the *Spanish* governor, as a reprisal for transgressions alledged to have been committed by a *British* ship in the *Lakes*.—In an action on the policy, it was contended on the part of the defendant, that this being an insurance on an illicit trade, the contract was void.—Lord *Mansfield*, who tried the cause, said—"The first question is, whether this policy covers the trading on the *Mississippi*, before the ship's arrival at *Manshac*. The trading at *Little Manshac* is a delay of the voyage, and an increase of the risk. If the policy does not cover this part of the trading, then it is a deviation, and there is an end of the contract. It is very clear what the trade is. *Every trading with the subjects of Spain is illicit by the treaty of Paris.* The navigation is free to both countries, and the municipal laws of both countries remain (*b*). Though

(*a*) But though the policy may not be void for this cause, yet it has been holden that where a ship is seized for navigating contrary to the laws of another country, or for not paying customs, the insurer shall not be answerable. Per *Hutchin*'s Comr. *Anon.* 2 *Vern.* 176.

(*b*) "But every treaty is a part of the private law of each of the countries which are parties to it, and is as binding on the subjects of each, as any part of their own municipal laws."—See the judgment of Sir *William Scott*, in the case of the *Enrom*, 2 *Rob.* Adm. Rep. 6.

such

ſuch trading be contrary to the laws of *Spain*, yet no country pays attention to the revenue laws of another. Therefore, *if the defendant had, with full knowledge that it was a ſmuggling trade with* Spain, *made the inſurance, then it might be a fair contract between the parties* (*a*).—But the main queſtion for conſideration ſeems to be, whether this trading to *Little Manſbae* was inſured by the policy." —The jury found for the defendant, it may be preſumed, on the ground of deviation.

Sect. II.

Prohibited Commerce with the Britiſh Colonies.

An inſurance upon any commerce carried on contrary to the laws in force in the *Britiſh* colonies, is void.

BUT though, according to the opinion of Lord *Mansfield*, the revenue laws of foreign countries are not to be regarded in *England*, yet, an inſurance on goods which are meant to be imported into, or exported from, any of the dependencies of the crown of this realm, contrary to the laws in force in thoſe places, would, I conceive, be void: For it would be inconſiſtent with the protection which the ſovereign owes to the ſubordinate ſtate, to encourage any commerce injurious to its intereſts, or to countenance any infraction of thoſe laws, to which the king, as the head of the ſtate, has given his ſanction.

Hence it follows that no legal inſurance can be made on any commerce carried on with any of the *Britiſh* colonies, in contravention of the laws made in this country for the regulation of the commerce with thoſe colonies.

By the *navigation act*, no goods ſhall be imported into, or exported from, the *Britiſh* plantations, but in *Britiſh* or plantation ſhips.

The general policy of the maritime ſtates of *Europe* is nearly the ſame reſpecting their colonies, and has a double object.—The one to ſecure an excluſive market for the commodities of the mother country;—the other to ſecure to the mother country the excluſive diſpoſal of the produce of the colonies. This policy gave birth to the celebrated *navigation act*, which had its origin in the

(*a*) The queſtion here was not whether the contract was fair, *as between the parties*; but whether a court of law in *England* ought to have lent its aid to give effect to an inſurance made to protect a trade carried on, not only againſt the revenue laws of another country, but alſo againſt good faith

year

year 1650 (*a*) during the usurpation, and was continued after the restoration by the stat. 12 *C.* II. c. 18. § 1.; by which it is enacted,—'That no goods or commodities shall be imported into, or exported out of, any lands, islands, plantations, or territories belonging to his Majesty his heirs and successors, in *Asia*, *Africa*, or *America*, in any ships or vessels but such as belong to the people of *England*, *Ireland*, *Wales*, or *Berwick upon Tweed*, or are of the built of, and belonging to, the said lands, islands, &c. and whereof the master and three-fourths of the mariners at least are *English*, under penalty of forfeiting the goods and ship.'—And, by § 4. 'No goods of foreign growth or manufacture shall be brought to *England*, &c. in such ships, so navigated, but from the places of their growth or manufacture, or from the ports where they are usually first shipped, under the like penalty.'—And, by § 18. 'No sugars, tobacco, cotton-wool, indigo, or dying wood, of the *English* plantations in *America*, *Asia*, or *Africa*, shall be carried from such plantations, to any land, island, territory, dominion, port or place, other than to such other *English* plantations, as belong to his Majesty, or to *England*, *Ireland*, *Wales*, or *Berwick upon Tweed*, under pain of the like forfeiture.'—And by sect. 19. '*English* ships, &c. shall give bond that any commodities loaded at any of the said plantations, shall be landed at some port of *England*, *Ireland*,' &c.—And the stat. 7 & 8 *W.* & *M.* c. 22. § 2. enacts 'that such ships shall be wholly owned by the people of *England*, *Ireland*, or the colonies, and the masters and three-fourths of the mariners shall be of those places; except prize ships, navigated as aforesaid.'—The 4th and 5th articles of the union with *Scotland* (*b*) extends these privileges to *Scotland*; and the 6th article of the union with *Ireland* (*c*) regulates them with respect to that country.

No colonial produce shall be carried to any place but *England*, &c. or other plantations.

By 7 & 8 *W.* 3. c. 22. the master and three-fourths of the mariners must be *English*.

Extended to *Scotland* and *Ireland*.

(*a*) Scobell, 132.—(*b*) Vid. the articles of union with *Scotland*, 5 *An.* c. 8., 12 *G.* 2. c. 30., and 15 *G.* 2. c. 33.—(*c*) Vid. the articles of union with *Ireland*, 39 and 40 *G.* 3. c. 67.

The

An infurance on goods from the *Weft Indies* to *Gibraltar* is void.

The word *plantation* in the above ftat. 12 *C.* II. c. 18. § 18. has never been applied to any of the *Britifh* dominions in *Europe*, but only to the colonies in the *Weft Indies* and *America*. Colonial produce, therefore, cannot be legally fhipped in the *Britifh Weft Indies* for *Gibraltar*, and confequently an infurance upon goods fo fhipped will be void (*a*).

The immenfe benefits which have refulted to this country from thefe wife regulations, have naturally inclined the government to watch, with great jealoufy, any attempts to evade them. The following cafe will fhew that the courts, too, are equally difpofed to enforce them, according to their true fpirit.

Chalmers v. *Bell*, 3 *Bof. & Pul.* 604.

A *Swedifh* fhip takes in part of her cargo at *Madras*, with which fhe fails for *Gottenburgh*. An infurance on this cargo is void, the goods fhipped at *Madras* being exported from thence in contravention of the navigation laws.

An infurance was made on goods on board the fhip *Refolution*, warranted *Swedifh* fhip and property, at and from the fhip's loading port or ports in the *Eaft Indies* to *Gottenburgh.*—In an action on this policy, it appeared that the *Refolution* was fent by the *Swedifh Afiatic Company* in *October* 1795 to *India* upon a general trading voyage; that, in the profecution of this adventure, fhe took in the greateft part of her cargo at *Tranquabar* and *Manilla*, and proceeded to *Madras*, where fhe obtained a further part of the cargo upon which the policy was effected; that the fhip, with the goods fhipped at *Madras*, being regularly cleared outwards at that port, fhe failed on her homeward voyage, in which fhe was captured by a *French* privateer and condemned.—Upon this cafe it was objected on the part of the underwriters, that this infurance, being upon a trading in contravention of the above acts 12 *C.* II. c. 18. § 1. and 7 and 8 *W.* & *M.* c. 22. § 2., was void.—On the other fide, it was alledged that the provifions of thefe acts, fo far as they relate to the trade of foreigners with the *Britifh* poffeffions in *India*, was repealed by the ftat. 33 *G.* 3. c. 52. § 138, 139. which enables the fervants of the *Eaft India Company* to buy goods in *India*, and fell them there to the fubjects of foreign ftates, and to act as the agents or factors of any foreign company or foreign merchant; and, that thefe provifions, though they do not in terms

(*a*) *Lubbock* v. *Potts*, 7 *Eaft* 449.

fufpend

suspend the operation of the navigation laws with respect to foreigners trading to *India*, plainly recognize a right in foreign merchants to carry on such trade.—But the court were of opinion that, though the stat. 33 *G.* III. authorized foreigners to *buy and sell* in *India*, it did not authorize them to *export* commodities in any manner different from that which was prescribed by the navigation laws; and therefore they determined that the policy was void, and that the plaintiffs were not entitled to recover.

An insurance on a voyage to the *East Indies* in contravention of the 9 and 10 *W.* and *M.* c. 44. is void, though the *penalties* of that statute have been repealed.

The vast profits arising from the trade to the *East Indies*, have always afforded a strong temptation to private adventurers to engage in a contraband commerce with those parts, notwithstanding the charter and the acts of parliament by which the monopoly of that trade has been, from time to time, secured to the *East India* Company. The act by which this was first effectually done, was the stat. 9 & 10 *W.* III. c. 44. And though this act has been frequently altered and partly repealed by subsequent statutes, yet it has never been wholly put an end to: On the contrary, any infringement of it is still illegal. And though such parts of it as inflicted *penalties*, have been repealed by the stat. 33 *G.* III. c. 52.; and though this last act has provided that no acts, or parts of acts, thereby repealed, shall be pleaded or set up in bar of any action, &c. yet the following case proves that it is competent to underwriters who have subscribed a policy on a ship trading to the *East Indies* in contravention of this act, to avail themselves of it in defence to an action on such policy.

Camden and others v. *Anderson*, 6 T. R 723. 1 *Bos.* and *Pul.* 272.

A ship being employed to carry convicts, stores, &c. to *New South Wales*, the owners obtain a licence from the *India* Company to sail thither, and from thence to *Bombay*, there to purchase a

The ship *Albemarle* was insured, 'At and from *London* 'to *New South Wales*; and at and from thence to all 'ports and places in the *East Indies*, *Persia*, *China*, or 'elsewhere; and at and from thence until her safe arrival 'back at *London*; with liberty to touch, stay, and trade 'at any port or place whatsoever, as well on this, as on 'the other side of the *Cape of Good Hope*.'—In an action on this policy, to recover a loss by capture on the homeward voyage, it appeared that the plaintiffs being employed to convey convicts, stores, and provisions, to *New South Wales*, obtained from the directors of

f cotton, ruin to n; but ate that er trade be carried The owners, r, send s not authorized by the , with directions to proceed to *Goa*, and em there, *Bombay*.— surance on ship is void, effected trade undertaken with a to break in the Company's mono-

of the *India* Company, a licence for the ship for a voyage to *New South Wales*, &c.; and from thence to *Bombay*, there to purchase cotton, to be legally imported, and sold at the Company's sales in *London*; and that they covenanted, '*that the owner, master, or mariners, should* '*not carry on, or be concerned in, any kind of trade in the* ' East Indies, *or elsewhere within the limits of the Com-* '*pany's charter*, &c.; and that if they should carry on ' any such traffic, they should be considered as illicit ' traders, the goods forfeited, and the persons liable ' to the same penalties as unlicensed traders;' that the plaintiffs ordered the master, after the delivery of the convicts, &c. at *Port Jackson*, to proceed to *Goa*, and there dispose of, or send by other vessels to *Bombay* for sale, copper and other articles, not authorized by the licence of the company; that the ship sailed with the above unlicensed articles on board, and the plaintiffs wrote to their agent at *Bombay*, informing him of their instructions to the master; that the ship, pursuant to the orders of the plaintiffs, sailed from *Port Jackson* to *Goa*, where the master sold the licensed cargo, and then sailed to *Bombay*, from whence, on the 23d of *December* 1792, she sailed for *London*, and was captured in the course of the voyage; that all the above facts happened before, and the action was commenced after, the passing of the stat. 33 *G.* III. c. 52. and that the plaintiffs were *British* subjects resident in *England*; that this act continues to the company, for a further term, the possession of the *British* territories in *India*, together with their exclusive trade, under certain limitations. The 146th section repeals so much of the stat. 9 and 10 *W.* III. c. 44., and of many other acts (*a*), as inflicted any penalty or forfeiture for illicit trading to the *East Indies*. The 147th section provides, '*that this repeal* '*shall not extend to any offence committed against any of the* '*statutes thereby wholly or in part repealed, before the passing of* '*the act*.' The 150th section, "for obviating any doubts, how far, notwithstanding such repeal, contracts made, contrary to the restrictions contained in the said acts were

(*a*) *Vid.* the acts, thus repealed, enumerated in 6 T. R. 727.

binding,"

binding,"—enacts, 'That it shall not be lawful for any 'defendant in any action then depending, or thereafter 'to be brought, to plead or set up any act so repealed, 'in the whole or in part, in bar of such action; but 'that the plaintiff shall have the same remedy and judg- 'ment as if the said acts, or parts of acts, so repealed, 'had never been made.'—Upon this case it was alledged on the part of the defendant, that the 146th section of this act, repealing so much of the former acts as inflicted penalties for illicit trading to *India*, did not extend to any of the provisions for granting and securing the exclusive trade to the company; and that, by several acts and parts of acts remaining unrepealed, such exclusive right was reserved to them, and all others prohibited from invading it; and the proviso in the 147th section, was relied on to shew that such repeal should not extend to any offence committed against any of the acts thereby wholly or in part repealed, before the passing of the act. It was therefore insisted, that the policy being effected to protect a trade, which was meant to be carried on contrary to the spirit and intention of the existing laws, was illegal and void; and that the objection might be taken advantage of in this action, although the right of suing for the former penalty was taken away from any common informer.—On the part of the plaintiffs it was replied, that, as all these transactions happened before the passing of the stat. 33 *G* III. c. 52., the illegality of them could not be taken advantage of in this action, for the 146th section repealed all forfeitures and penalties contained in the acts there enumerated against such illicit trading; and the 147th section merely saved the right of such objection, as to offences already committed,—*to the company themselves*. But that the 150th section prevented any private subject from setting up any of the repealed acts or clauses in bar of any action on any contract made before, as a pretext that such contract was made contrary to the prohibition contained therein. —The court, on full consideration, held that the construction insisted on by the defendant was the fair one; and determined that the stat. 9 & 10 *W.* III. c. 44. was still in force; that as the policy was effected in contra-

vention of that act, by breaking in upon the monopoly of the company, it was void; and that the defendant was therefore entitled to judgment, which judgment was afterwards affirmed, upon writ of error in the *Exchequer Chamber* (*a*).

The *Americans* are by treaty permitted to trade to the *British* settlements in *India*.

By the treaty between *Great Britain* and the *United States* of *America*, concluded in 1795, and confirmed by the stat. 37 *G.* III. c. 97., it is agreed,—'That the citizens of the *United States* shall be received into the 'ports and harbours of the *British* territories in the '*East Indies*, and may freely carry on trade between the 'said territories and the *United States*, in all articles of 'which the exportation or importation to or from the 'said territories shall not be entirely prohibited.'—It then adds several regulations under which this trade may be carried on, one of which is,—'That the vessels of 'the *United States* shall not carry on any part of the 'coasting trade of the said territories; but that, vessels 'going with their original cargoes from one port of discharge to another, are not to be considered as carrying 'on the coasting trade.'—In the following case it was determined that, under this treaty, it is not necessary that this trade should be carried on from *America* to the *British* settlements in the *East Indies direct*, but that it may be carried on *circuitously* by the way of *Europe*, and by a *British* subject naturalized in *America*.

But not to carry on any coasting trade.

Wilson v. *Marryat*, 8 T. R. 31.

An *American* ship, the property of A. and B. both *British*-born subjects, but naturalized in *America*, (A. before and B, who was Captain, after the declaration of independence) sails to *France* with a cargo of goods, there disposes of them, and with the proceeds purchases goods for *India*, then sails to *Madeira*,

Three insurances were effected, the *first* on the 29th of *February* 1796, for the use of *John Collet*, upon the *American* ship *Argonaut*, and cargo, "At and from "*Bourdeaux* to *Madeira* and the *East Indies*, and from "thence to *America*; with liberty to touch, stay, and "trade at all ports and places whatsoever on her out-"ward and homeward voyages." The *second* on the 28th of *May* 1796, for the use of *Collet*, on the same ship and goods, "at and from *Bourdeaux* to the *East* "*Indies*, with liberty to touch, call, and trade at all ports, "places, or islands whatsoever, as well at the *Cape of* "*Good Hope*, as on this and the other side of it, until "her arrival at her port of discharge in *Bengal*." This

(*a*) 1 *Bos.* & *Pul.* 272.

policy,

policy, by a memorandum, was declared to be on wines and brandies, warranted neutral. The *third*, on the 15th of *August* 1796, on account of *Collet* and one *Anthony Butler*, on goods, warranted *American*, on board the same ship, "At and from *Madeira* to her last port of discharge in *India*, with a like liberty to touch, stay, and trade."—In an action brought on these three policies, the plaintiff declared as for a total loss on each, 1st, by seizure and detention by the King's officers; and 2dly, by the perils of the sea.—The count upon the third policy stated the goods to have been shipped at *Madeira* on the 1st of *June* 1796.—Upon the trial, it appeared, That the ship was the joint property of *Collet* and *Butler*; that *Collet* on the 25th of *July* 1795, sailed in the ship as master, from *Philadelphia*, with a cargo of corn and flour, for *France*, *with a view of proceeding from thence with the ship, after the disposal of her cargo, to* Madeira *and the* East Indies, *and from thence back to the* United States; that before the ship's departure from *Philadelphia*, *Butler* wrote to *Collet*, and, by way of assisting him to form a right judgment how to act, proposed three plans as probable to be accomplished; *first*, after his arrival in *France*, to get a freight to the *Isle of France*, to go from thence to *Bombay*, and to employ the ship in the country commerce between *India* and *China*, until she had gained sufficient to make a complete investment in *China* for *America*; *secondly*, to go from *France* to *London*, and there get a freight for the company's settlements in *India*, and then to pursue the same course of trade, or to take a freight direct from *Bengal* for *America*, for *Hamburgh*, or other neutral ports; *thirdly*, to gain a credit in *London*, and go out to *Bombay* or *Bengal*, with a complete investment on their own account, to obtain a freight to *China*, and at length to bring a cargo from thence, or *Bengal*, back to *America* or *France*; that *Collet* arrived with the ship at *Brest*, and there sold the flour, then proceeded to *Bourdeaux*, where he sold the rest of the cargo, and there purchased the goods mentioned in the second policy, and loaded them on his own account on board the ship, which, with the cargo, were

where she takes in the remainder of her cargo, consisting of *English* and *Portuguese* productions, and proceeds on her voyage to the *British* settlements in *India*, without any licence for the ship or the captain.—This voyage is legal, and the insurance on it valid; though the trade was not direct between *America* and *India*; and though, as far as related to the *British* goods, this was a trading from *Great Britain* to *India*, without a licence; and though C. was still a *British* subject.

there in safety on the 1st of *May* 1796;—that whilst the ship was at *Bourdeaux*, *Collet* came to *London*, and having obtained a credit with *Wilson* (the plaintiff,) who purchased, on account of *Collet* and *Butler*, *British* goods, being the goods mentioned in the third policy; and which were shipped at *London*, on the account and risk of *Collet* and *Butler*, on board three *American* ships, and conveyed to *Madeira*, for the purpose of being there put on board the *Argonaut*, and of being carried therein, together with the goods shipped at *Bourdeaux*, from *Madeira* to the *British* territories in the *East Indies*, and there traded with; that the *Argonaut* sailed to *Madeira*, where she took those goods on board, together with some *Portuguese* wines, *for the purpose of proceeding with her whole cargo to the* British *territories in the East Indias*, and of trading with them there, neither *Collet* or the ship being licensed by the *East India* company to sail or trade there; that the ship having sailed from *Madeira* for the *East Indies*, was, with her cargo, on the 2d of *August* 1796, at *Symon's Bay*, near the *Cape of Good Hope*, seized and detained by the *English* admiral, on suspicion of being an illicit trader; that both *Butler* and *Collet* were natural-born *British* subjects, and both become citizens of the *United States*, and domiciled there, the former before, the latter after, the declaration of independence; that on the 16th of *February* 1793, the usual proclamation at the beginning of every war was published here, forbidding all mariners, &c. natural-born subjects of this country, entering or continuing in the service of foreign states, or serving in any foreign vessel, without the King's licence; and that *Collet* had not obtained any such licence; that the plaintiff, who was a *British* subject, resident at *London*, knew that the *Argonaut* was destined for the *British* territories in the *East Indies*, and that the goods were intended to be carried thither for the purposes of trade therein.—Upon this case it was objected, on the part of the defendant, 1*st*. That, under the 13th article of the treaty, the *circuitous commerce*, which was the subject of the insurances, was not permissible, that article only allowing of a *direct intercourse* between the *United States* and the *British* settlements in *India*; which was plainly

plainly indicated by the word *between*; 2*dly*. That, by the 14th article, the trade between *America* and the King's dominions in *Europe*, is to be ſubject to the laws of the reſpective countries; and by the prior exiſting laws of *Great Britain*, all perſons, as well foreigners as natives, except the *Eaſt India* company, are prohibited from trading from *Great Britain* to the *Eaſt Indies*; and that as the *Argonaut* was to take in goods at *Madeira*, ſent from *Great Britain*, to be carried to the *Britiſh* ſettlements in *India*, this was, in effect, a trading from *Great Britain* to the *Eaſt Indies*, to which the *American* treaty only afforded a fraudulent colour; 3*dly*. That, admitting ſuch a circuitous voyage from *America* to *India*, by the way of *Europe*, to be warranted by the treaty, ſtill this voyage, undertaken with that view, being commenced before the ratifications of the treaty were exchanged (*a*), was illegal, and no part of an illegal voyage can be inſured; but, if it ſhould be conſidered only as a voyage from *Bourdeaux*, and ſo commencing after the ratification of the treaty, then it would not be within the 13th article, as not being a trading between *America* and the *Eaſt Indies*, in any ſenſe; 4*thly*. That, as *Collet* was born under the King's allegiance, and not being a citizen of the *United States* at the time of the declaration of their independence, he could only be conſidered as a *Britiſh* ſubject, and as ſuch, incapacitated by the navigation act, ſtat. 12 *C.* II. c. 18., from being maſter of an *American* veſſel, and prohibited by the acts for regulating the trade to the *Eaſt Indies* from trading thither, except under the orders, or by the licence of the *Eaſt India* company.—But the court, upon great conſideration, overruled all theſe objections, and determined that the plaintiff was entitled to recover.—Lord *Kenyon*, in delivering their opinion, ſaid,—"Three objections have been raiſed on the part of the defendant. I will diſpoſe of that firſt which was laſt in argument, namely, That *Collet*, the captain and part-owner of the ſhip, was an *Engliſhman* by birth, and was not, therefore, a citizen of *America*, within the mean-

(*a*) This, by the 28th article, was the period of its commencement.

under this treaty; and his coming to this country for a temporary purpose does not deprive him of those advantages.

ing of the treaty between this country and *America*; but we are clearly of opinion that there is no weight in this objection. *Collet* is a citizen of this country by birth, so that he cannot throw off his allegiance to it; he is also a citizen of *America*, for the purposes of commerce, having been adopted as a citizen there; and his being a natural-born subject here, cannot deprive him of the advantages of being a citizen of that country. As to the construction of the 13th article of the treaty, it was contended that the intercourse between *America* and the *East Indies* must be immediate and direct: But, on comparing this with the other articles of the treaty, we are also of opinion that this objection is unfounded. That the party insured might have come from *America* to other countries in *Europe*, might have bought goods, carried them back to *America*, and from thence to the *East Indies*, seemed to be admitted. Then, in point of reason, why may not that which may be done indirectly, be done directly (*a*), and on the fair construction of the words of this article, we think that this objection cannot prevail. The remaining objection is, that the voyage insured was a part of a voyage, the whole of which, supposing it to be one integral voyage, was not legal in its inception; and that, if there be any infirmity in any part of an integral voyage, the whole, for this purpose, becomes illegal. But this argument is too refined, as applied to this case. Before the commencement of this voyage, there was a rumour, that a treaty between the two countries was in agitation, and this person came to *England*, probably with a view of carrying on the voyage to the *East Indies* under the treaty. However, in deciding this case, we must look to the facts. Now it is not

If an *integral* voyage be, in any respect, illegal in its commencement, no insurance can be legally effected on any part of it, though such part, taken by itself, would be legal.

(*a*) Perhaps, in answer to this question, it might be alledged that the *British* government, knowing the disadvantage with which the *Americans* must carry *European* commodities directly from *America* to *India*, meant that the trade between them and the *British* settlements in *India* should be *immediate and direct*, lest the *Americans*, by taking *Europe* in their way to *India*, might too easily rival the company in the *Indian* markets.

stated,

ſtated, that the continuation of the voyage to the *Britiſh* ſettlements in the *Eaſt Indies*, was the voyage that was at all events to be performed, when the voyage began in *America*. For though different plans had been ſuggeſted by *Butler*, in his letter, for the continuance of the voyage, it appears only that *Collet*, when he failed from *America*, intended to go to the *Eaſt Indies*, but without ſaying to that part which belongs to *Great Britain*. As far as reſpected the *Americans*, every other part was *mare liberum*; and though before the treaty, the inſured could not have gone to any of our ports in the *Eaſt Indies*, without being guilty of an infraction of our law, he might have gone to any other port in the *Eaſt Indies*. Every thing, therefore, relating to theſe different plans, though a fair ſubject of inveſtigation and diſcuſſion, may now be laid out of our conſideration; as it does not appear what preciſe voyage the parties had in contemplation at the inception of the voyage from *America*. Then, if the voyage inſured be not infected by what was done in *America*, it was a legal voyage. The ſhip originally ſailed from *Philadelphia* to *Breſt*, and then to *Bourdeaux*, which ſhe might legally do; and, before ſhe left the latter place, the treaty between this country and *America* was ratified. It then appears, that in *May* 1796, ſhe ſailed to *Madeira*, where ſhe took in other goods, "for "the purpoſe of proceeding with the whole cargo to the "*Britiſh* territories in the *Eaſt Indies*," which *then* ſhe might well do, under the treaty which had before that time been ratified. Then it does not appear that *Collet* had any intention of going to any of our ſettlements in the *Eaſt Indies*, until after the ratification of the treaty; and, though I admit, that if there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, ſo that the inſured could not recover upon a policy on any part of it; yet it not appearing that in fact, there was any illegality in any part of this voyage, we are of opinion that this objection alſo fails."—This judgment was afterwards affirmed upon a writ of error in the *Exchequer Chamber*, on which occaſion the opinion of

of the court was delivered by Lord C. J. *Eyre* on all the points of the case, in a very able and elaborate judgment (*a*).

If a foreign ship trading to the *British* settlements in *India*, under a treaty, violate any of the regulations of such treaty, this will avoid any policy on her.

But an *American* ship trading to the *British* settlements in *India*, pursuant to the treaty already mentioned (*b*), must conform strictly to the regulations prescribed by such treaty; otherwise she will be subject, not only to the penalties prescribed by law for any violation of the company's monopoly, but also render void every policy of insurance made in this country which attaches at any time during the illicit commerce. And an illegal cargo on board but for an hour after a policy attaches, will avoid that policy and discharge the underwriters from all subsequent responsibility. But a legal cargo may be insured, though purchased with the proceeds of an illegal one; and though the ship had, by her previous illegal commerce, been subjected to seizure and confiscation. These points will be found determined, upon full consideration, in the following case (*c*).

But a policy on a legal cargo is not vitiated by the ship having previously acted in contravention of the treaty.

Bird v. *Appleton*, 8 T. R. 562.

An *American* ship at *Bombay* takes in goods for *China* contrary to the *American* treaty. With the proceeds she purchases a cargo at *Canton*, for *Hamburgh*.—A policy on the *ship at and from Canton* to *Hamburgh* is void, because the illegal cargo was on board part of the time the ship remained at *Canton*; and this insurance will not protect the ship on her voyage to *Hamburgh* with another cargo.—But a policy on the *goods* from *Canton* to *Hamburgh* is good, though purchased with the

An insurance was made on *goods* on board the *Confederacy*, an *American* ship, "At and from *Canton* in *China*, "to *Hamburgh* or *Copenhagen*, with liberty to touch, stay, "and trade, at all ports and places whatsoever, particu"larly at a port in the *Channel*."—This policy was effected for the benefit of *Leffingwell* and another. There was also a policy on *the ship* for the same voyage. In an action on these policies, it appeared that the ship was *American* built, the property of *American* subjects, commanded by an *American* captain, and furnished with the requisite *French* passport. She sailed with a cargo from *London*, for *Bombay*, where she arrived in *June* 1796, and there disposed of her cargo; and the captain having, by a licence obtained from the governor and council, taken on board a cargo of cotton for *Canton*, she sailed for that

(*a*) 1 *Bos.* & *Pul.* 430.——(*b*) Sup. 68.——(*c*) Vid. *Mork* v. *Abel*, *inf.* ch. 15. s. 1. in which it was determined that a policy upon a cargo of goods exported from *Calcutta* in a foreign ship was void by the navigation act, though this commerce was permitted by government, and soon after sanctioned by act of parliament.

place,

place, where she arrived in *October* 1796. There her cargo was disposed of, and the goods mentioned in the first policy were purchased, partly with the proceeds of the cargo from *Bombay*, and shipped for *Hamburgh*. The ship sailed for *Hamburgh* in *January* 1797, and was captured by the *French*, carried into *Nantz*, and there condemned on the ground of her having violated some of the *French* ordinances.—By an article of the treaty between this country and the United States of *America*, referred to in the stat. 37 *G.* III. c. 97., it is stipulated that the citizens of the United States shall be permitted to trade with the *British* terri ories in the *East Indies*; but it is expressly agreed, '*that the vessels of the United States shall* '*not carry any of the articles exported by them from the said* 'British *territories to any port or place, except to some port* '*or place in* America, *where the same shall be unladen*; and 'that the permission granted by this article is not to 'extend to allow the vessels of the *United States* to carry 'on any part of the coasting trade of the said *British* 'territories.' The voyage from *London* to *Canton*, and that from *Canton* to *Europe*, were two distinct voyages.—In the argument, the policy on the *ship* was abandoned by the plaintiff's counsel, on this ground, that as this policy, which was "*at* and from *Canton*," attached from the time the ship arrived there, including the period of time while the cotton taken in at *Bombay*, in contravention of the above article of the treaty, was still on board; and as the immediate voyage insured could not be severed, the whole must be deemed an illegal adventure.—On the policy on the *goods*, several objections were made on the part of the defendant: 1*st*, That the goods insured were purchased with the proceeds of the illegal cargo procured at *Bombay* (it being admitted that the governor's license to purchase it was illegal), and that such an adventure was contaminated by such an antecedent illegal traffic. 2*dly*, That the voyage from *Bombay* to *Canton* was only a part of a larger voyage, out and home, from *London* to *Canton*, and from *Canton* to *Europe*; and that as the ship, in the course of the voyage, traded at *Bombay*, contrary to the treaty between this country

proceeds of the illegal cargo.—The insurance on the voyage from *Canton* was legal, though the ship had been liable to seizure in the voyage from *Bombay* to *Canton*.

and

and the *United States*, by not returning directly from *Bombay* to *America*, the whole voyage was illegal. 3*dly*, That the ship was seizable, for a violation of the navigation act, in a prior part of the voyage from *Bombay* to *Canton*, and consequently that the goods insured were not put on board a proper ship, such as the insured impliedly undertook to provide; and that the right of seizure continued at least during the time that the ship was on the high seas, and until her return home. 4*thly*, That the sentence of condemnation by the tribunal at *Nantz* negatived the ship's being an *American*.—But the court determined, that the plaintiff was entitled to recover on the policy on the goods.—Lord *Kenyon* said,—"It is now very properly admitted, that the policy on the *ship* must be abandoned, because during part of the time that the parties intended that the policy should attach, namely, while the ship was at *Canton*, there was something illegal in the transaction. As to the policy on the *goods*, if the objection, that the contract is illegal, because the goods were purchased with the proceeds of a former illegal cargo, were well founded, it would go to an alarming extent.—In deciding on a claim made on a policy of insurance, it would be necessary to examine and scrutinize the past conduct of the insured, in order to see whether or not, by their former transactions in life, they had illegally acquired the funds with which the particular goods insured were purchased. But we cannot enter into considerations of that kind; we must confine ourselves to the immediate transaction before us. And the voyage homeward *from Canton*, being found to be a *separate and distinct voyage* from that *to Canton*, the homeward voyage, therefore, cannot be affected by the former outward voyage. After the greatest attention which I have been able to bestow on the subject, I adhere to the opinion that we gave in the case of *Pollard* v. *Bell* (*a*), in which it was established as a proposition, that the courts of admiralty are to proceed on the known *jus gentium*, or on the treaties betwe.n particular states;

(*a*) *Inf.* c. 9. s. 5.

that

that ſuch treaties do not alter the *jus gentium* with reſpect to the reſt of the world; but, as between thoſe particular ſtates, they are conſidered as engrafted on the *jus gentium*; and that one ſtate has no authority, by any ordinance of its own, to vary the general law of nations, as to other ſtates. But the ground of the ſentence of the *French* court of Admiralty, in this caſe, is the not conforming to a *French* ordinance in a matter which is neither required by the law of nations, or by the treaty between *France* and *America*; and it is found by the verdict that all the requiſites of that treaty were complied with." Mr. Juſtice *Lawrence* ſaid,—" With regard to the firſt objection, made on the part of the defendant, in ſuch a caſe as the preſent, we cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchaſe of goods: Had it been obtained by robbery on the highway, and inveſted in the purchaſe of a cargo, I do not know why that cargo may not be legally inſured. In order to render the inſurance illegal, the illegality ſhould exiſt during the courſe of the voyage inſured; nor do I think that the next objection, that the plaintiffs cannot recover, becauſe the ſhip was liable to ſeizure, is well founded: Here the illegality commenced by the captain taking on board a cargo at *Bombay*, in order to carry it to *Canton* for ſale. But the doctrine relied upon by the defendant is perfectly new, that the inſured cannot recover on the policy, becauſe the ſhip, in a prior voyage, had been guilty of ſome tranſgreſſion, for which ſhe was liable to be ſeized. That is not a riſk within the policy. If the ſhip had been ſeized for this cauſe during the voyage inſured, the underwriters would not have been liable; they are only liable for riſks in the courſe of the voyage inſured. Then the only remaining queſtion is, whether or not it were decided by the foreign ſentence, that the ſhip was not an *American*. The attempt on the part of the defendant here, is not ſo much to diſpute the authority, of the caſe of *Pollard* v. *Bell*, as its application to the caſe before us. However, I am of opinion, that on the whole, we muſt conſider that the foundation of this ſentence of con-

condemnation, was the violation of *French* ordinances only, and consequently that the case of *Pollard* v. *Bell* is a direct authority for the present."

Sect. III.

Contraband of War.

Vid. sup. ch. 2. f. 1.

The obligations of neutrality.

IN time of war, it is the duty of those who are not engaged in it, and who profess to be neutral, to observe an exact impartiality between the contending parties, and to afford no assistance to either, to the prejudice of the other. *Pacem utrique parti quod medios deceat amicos, optent, bello se non interponant* (*a*). To what extent, and in what articles, neutrals may trade with the subjects of a belligerent power, is a question upon which there has always been a great difference of opinion; some contending for the rigour of war, and others for a freedom of commerce, which it is difficult to reconcile with any just notions of neutrality, but which, by the law of nations, as they say, any neutral state may carry on with any belligerent. It must be owned, that in the decision of this question, much frequently depends on the power of the party, whether belligerent or neutral, who contends for the one principle or the other. Breaches of neutrality are often suffered to pass unnoticed, because the party who suffers by them, finds it necessary to dissemble his resentment, lest he should draw new enemies on himself; and neutrals often submit to great outrages rather than involve themselves in war. There are, however, certain principles, which, though occasionally, violated, are universally respected as public law. That law has pretty acurately defined what shall be deemed contraband of war.

What articles are contraband.

Some articles of commerce, are of use only in war; these are the *belli instrumenta*, viz. arms, ammunition, and other warlike stores; some are of no use in war, as those that serve only for pleasure, and the uses of common life;

(*a*) *Liv.* lib. 35. c. 48. Vid. *Vatel, Droit des Gens, liv.* 3. *ch.* 7. n. 103, 104.

and

and some are useful both in peace and war, as money, provisions, horses, ships, naval stores, &c.—The first of these, namely, warlike stores, when sent to either party, are always deemed contraband by the other; and by the law of nations, are subject to capture and confiscation, in whatever vessel they are found; this species of commerce with an enemy, being indisputably inconsistent with neutrality (*a*).—*Locennius* extends the prohibition even to provisions (*b*). But, the law of nations, as at present understood, seems to confine that restriction to places besieged or blockaded (*c*).

Not only arms, powder, ball, and other ammunition, but also horses and furniture, pitch, tar, sails, hemp and cordage, masts, yards, and all other necessaries for the building or equipment of ships, are generally considered as contraband, by the law of nations (*d*). It is to be observed, however, that the liability of articles of this latter description to capture and confiscation, depends sometimes on the place of their destination. For instance, tallow is contraband, when destined to a port of mere hostile equipment, such as *Brest*; not so, if it be destined to a commercial port, though it be also a port of naval equipment; but *sail cloth* is universally contraband, even on a destination to ports of mere mercantile naval equipment (*e*). *Pitch, tar, hemp,* &c. are generally contraband: But there is in the practice of the court of admiralty, a relaxation with respect to such articles, which

(*a*) *In hostium est partibus qui ad bellum necessaria hosti administrat.* *Grot* lib. 3. c. 1. s. 5.——(*b*) *De jure maritimo,* lib. 1. c. 4. n. 9.——(*c*) *Valin,* tit *Des prises,* art. 11. p. 264. The pensionary *De Witt,* in his letter of the 4th of *January* 1654, agrees that it would be contrary to the law of nations to restrain neutral nations from carrying corn and provisions to the enemy's country; but he says that they may be restrained from carrying thither any of the necessaries for equipping ships of war. But Queen *Elizabeth,* in 1599, would not permit the *Danes* or *Poles* to carry provisions to *Spain,* declaring that "by the rights of War, it was permitted to reduce an enemy by famine, to seek for peace." Vid. *Grot.* lib. 3. c. 1. s. 5. *Vattel Droit des Gens,* liv. 3. c. 7. n. 112.——(*d*) *Vattel,* liv. 3. c. 7. n. 112.——(*e*) So determined in the case of the *Neptunus,* 3 *Rob.* Adm. Rep. 108.

allows

allows the carrying of them, provided they are the produce of the exporting country. But this relaxation is understood with a condition, that these articles may be brought in, not for confiscation, unless where any fraud appears, but for pre-emption (*a*). Formerly, by the law of nations, the carrying of contraband of war worked a forfeiture of the ship: But in modern practice, except where the contraband articles belong to the owner of the vessel, or where the case is attended with particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expences (*b*). —What articles shall or shall not be deemed contraband, as between particular states, are often regulated and ascertained by particular treaties.

Commerce with places besieged.

Beside these restrictions, there is another by which all commerce is absolutely prohibited with a town or place besieged, invested, or even blockaded; for the besiegers have, by the law of nations, a right to prevent all communication with the place invested, and to treat as an enemy, whoever attempts to enter, or carry any thing into it, without permission (*c*). And egress is as much a breach of a blockade as ingress, if it be done fraudulently (*d*).

But the power which undertakes a blockade, ought immediately to notify this to all neutral states. The effect of such a notification is, to include all the individuals of those states; because it is presumed that those states communicate the information to their subjects, whose interests they are bound to protect: Therefore no neutral subject, after such notification, can be allowed to aver

(*a*) Vid. the case of the *Sarah Christina*, 1 *Rob.* Adm. Rep. 237.——(*b*) Vid. 1 *Rob.* Adm. Rep 288. *Bynkershoek* thus vindicates the rigour of the ancient law: *Publicabam quoque naves amicas si scientibus dominis contrabanda ad hostes deferrent; et, nisi pacta impediant, omnino publicandæ sunt, quia earum domini operantur rei illicitæ.* Quæst. jur. priv. lib. 1. ch. 14. ——(*c*) *Vattel*, liv. 3. c. 7. n. 117. *Grot.* l. 3. c. 1. f. 5. *Bynk. quæst. jur. pub.* l. 1. c. 11.——(*d*) Vid. *Bynk.* ib. l. 3. c. 4. and 1 *Rob.* Adm. Rep. 88. 151. 171.

ignorance

ignorance of such blockade.—There is this difference between a blockade thus regularly notified, and a blockade *de facto*, that, in the former, the act of sailing to the blockaded place amounts to a breach of the blockade, and subjects the neutral ship to capture and confiscation; whereas, in the case of a blockade *de facto*, the ignorance of the party may be received as an excuse for sailing to the place blockaded (*a*).

The right of visiting and searching neutrals.

But it would be impossible to prevent the transport of contraband goods, if neutral vessels might not be searched at sea; and hence has arisen the right of search assumed by all belligerent powers, though formerly resisted by such states as were powerful enough to protect their subjects in their refusal. But it seems now to be settled, that a neutral ship which should refuse to submit to such search, or to produce her papers, when required by any belligerent, would be subject to condemnation for that cause alone (*b*). To prevent, however, the inconvenience, vexation, and abuse arising from an unrestrained licence to search all neutral ships, the manner of doing it is usually regulated by the different maritime states, in their treaties of navigation and commerce with each other; and credit is usually given to the bills of lading, invoices, clearances, and other papers on board, unless fraud appear, or there be a reasonable ground to suspect it. We shall have occasion to consider this subject more at large hereafter (*c*).

The insurance of contraband of war is void.

The sending of any of the articles denominated *belli instrumenta*, or any other succour, by a *British* subject in time of war, to the King's enemies, amounts to the offence of high treason (*d*). It is needless to add, that the insurance of such criminal traffic by a *British* subject, would be void. And though the sending of such goods to the King's enemies, by the subjects of a neutral power, would, in them, be no offence against the law of *England*;

(*a*) See the judgments of Sir *William Scott*, in the cases of breach of blockade in 2 *Rob.* Adm. Rep. 109. 111. 116. 124. 128. 131. &c.—(*b*) *Vattel*, liv. 3. ch. 7. n. 114. *Valin*, tit. *des prises*, art. 11. p. 270.—(*c*) Vid. *inf.* c. 9. f. 6.—(*d*) Vid. 4 *Bl.* Com. 82, 83.

yet the insurance of them, in this country, would be, not only void, but highly criminal in every person concerned in it.

An insurance on any trade, carried on in contravention of an embargo laid by the King, is void.

Another restriction on commerce arises sometimes from embargoes. The King, by his prerogative, has the power of issuing proclamations, which, when they are grounded upon, or are meant to enforce, the existing laws of the realm, have a binding force (*a*). In time of war, when the safety of the nation is concerned, the King may, by his proclamation, lay an embargo on all shipping, and shut up all or any of the ports in his dominions, either generally, or for the particular purpose of stopping the export of provisions, or other things (*b*); and any trade carried on, in contravention of such proclamation, is illegal, and consequently an insurance upon such trade, even when carried on by a neutral, is void.

Delmada v. *Motteux*, E. R. M. 25 *G.* 3. *Park* 234.

A neutral ship obtains a cargo of provisions in *Ireland*, after an embargo laid, and takes clearances for a neutral country, but sails for an enemy's port, and is taken:—This, being an illegal traffic, the policy is void.

Thus: After an embargo had been laid on all ships laden, or to be laden, in *Ireland*, with any sort of *provisions*, an insurance was made on the *Bella Juditta*, a *Venetian* ship, the property of a subject of *Venice*, "At "and from *London* to the *Grenades*, with liberty to touch at "*Cork* and *Madeira* to load."—The ship sailed from *London* to *Cork*, and there took in a cargo of *provisions*, the property of *French subjects*, the enemies of *Great Britain*; and having obtained clearances and bills of lading for *Madeira*, she sailed to that island, where she was neither to unload any part of her cargo, nor to take any goods on board; but where she took clearances and bills of lading for *St. Thomas's*, a *Danish* island, whither she was not destined, but only to *Grenada*, then in the possession of the *French*, and on her voyage thither was captured by an *English* man of war, the cargo condemned by the Vice Admiralty Court of *Barbadoes*, as enemy's property, and the ship ordered to be restored, but *without freight* or damages for the capture, because she was engaged in an illicit commerce.—An action was brought on the policy, to recover for the loss of freight and damages occasioned

(*a*) 3 Inst. 162.——(*b*) Vid. 1 *Bl.* Com. 270. 4 *Mod.* 177, 179.

casioned by the capture.—But the court held that this voyage was a breach of the embargo; that it was a fraud to go to an enemy's port, under colour of going to a neutral port; and, consequently, that the insurance was illegal and void.—Lord *Mansfield* said,—"Is not this a breach of the embargo? The King, in time of war, has an undoubted right to lay an embargo: In time of peace it is another question. Every power lays them on. If the ship had only been carrying goods of an enemy on a voyage lawful for her to perform, she might have been entitled to freight. But here the sentence says she shall not: And why? Because she has done a wrong thing. It is a fraud; for under colour of a neutral port, she goes to an enemy's port. She breaks an embargo. What the consequence of that is, has not yet been settled: But, to break an embargo is undoubtedly a criminal act; and wherever a man makes an illegal contract, this court will not lend him their assistance to enforce it (*a*).

If all intercourse with a *British* colony be prohibited, an insurance on goods intended to be carried thither is illegal and void.

So, when all intercourse with the *American* colonies was prohibited by act of parliament, the following case will shew that a commerce carried on with those places, during the continuance of this prohibition, was illegal; and that an insurance on the trade is void, even though it had been countenanced by government, and encouraged by the King's officers.

Johnston v. Sutton, Doug. 254. S. P. *Vanharthals v. Halhed, M.* 21 *G.* 3. 2 *East* 487.

An insurance was made on goods on board the ship *Venus*, lost or not lost; "At and from *London* to *New* "*York*; warranted to depart with convoy from the *Channel*, "for the voyage."—The ship was cleared out for *Halifax* and *New York*. She had *provisions* on board, which she had a licence to carry to *New York*, under a proviso in the stat. 16 *G.* III. c. 5. § 1. which prohibited all com-

(*a*) There seems to be some inaccuracy in the report of this case. It states a *general* embargo on all ships laden with provisions in *Ireland*; and yet it states that the *Bella Juditta* took in a loading of provisions at *Cork*, from whence she took *clearances* and bills of lading for *Madeira*, as if that might have been legally done. It is probable that the embargo was confined to provisions meant to be exported to any of the possessions of the enemy.

merce with the province of *New York*, among others, and confiscated all ships and their cargoes which should be found trading, or going to, or coming from, trading with them. But there was a proviso in the act, (§ 2.) excepting 'ships laden with provisions for the use of his 'Majesty's fleets or garrisons, or the inhabitants of any 'town possessed by his Majesty's troops, provided the 'master should produce a licence, specifying the voyage, '&c. and the quantity and species of provisions; but 'that goods not licensed found on board such ships 'should be forfeited.'—But one half of the cargo, including the goods insured, was not licensed, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe*, the commander in chief, to allow the entry of unlicensed goods at *New York*; and though there were bonds usually given at the custom-house here, by which the captain engaged to carry the goods to *Halifax*, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at *New York*, declaring that they were landed there. The commander in chief had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods.—The ship was taken in her passage to *New York* by an *American* privateer.—In an action on the policy, the court determined that as this trade was expressly prohibited, the insurance was void, and the plaintiff could not recover.—Lord *Mansfield* said;—"The whole of the plaintiff's case goes on an established practice, directly against an act of parliament. If the insurer did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send goods to *New York*, and, *in pari delicto, potior est conditio defendentis*."

Gist v. Mason, 1 T. R. 84.

An insurance cannot be made on provisions sent in a neutral ship to a *British* colony, while in the hands of the enemy.

In the case of *Gist* v. *Mason*, which we have already noticed (*a*), the insurance was upon a cargo of provisions sent from *Ireland* to some of our *West India* islands, which had been captured by the *French* in the *American* war, where the insured had property, and which were constantly

(*a*) Sup. 36.

stantly supplied with provisions, by means of neutral vessels, though they were in the hands of the enemy.—In an action by an underwriter against the insured to recover the premium, the illegality of the commerce was objected.—Lord *Mansfield* being of opinion that the policy was not illegal on the face of it, directed a verdict for the plaintiff; and the court afterwards refused to grant a new trial to let the defendant in, to shew by evidence that the insurance was upon provisions supplied to the enemy.

Sect. IV.

Commerce with the Enemy.

BY the common law of *England*, no *British* subject can legally trade with an enemy, without the King's licence. The reason is, that war puts every individual of the respective belligerent governments into a state of mutual hostility (*a*); and there is no such thing as a war for arms, and peace for commerce. In that state, all treaties, civil contracts, and rights of property, are put an end to. Trading, therefore, which supposes the existence of civil relations, the rights of property, and the obligation of contracts, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading not only affords that aid in the most effectual manner, by enriching the enemy's

No *British* subject can trade with the enemy without a licence.

(*a*) *Quand le conducteur de l'état, le souverain, declare la guerre à une autre souverain, on entend que la nation entiere déclare la guerre à une autre nation. Car le souverain represente la nation, et agit au nom de la société entiere, et les nations n'ont à faire les unes aux autres qu'en corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets de l'un sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes. Vattel*, liv. 3. c. 5. n. 70.—*Ex natura belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, &c. Bynk. Quæst. jur. priv. lib.* 1. *c.* 3.

 country,

country, and increasing their resources, but also facilitates the means of carrying on a traiterous correspondence, which may more than counterbalance any advantage likely to accrue from such trading (*a*). This being so, it follows that every contract of insurance against the risks attendant on such trading, must be illegal.

Goods bought of the enemy cannot be insured.

Till lately, however, as we had occasion to observe in the last chapter, the general opinion, supported by constant practice, was, that in *England*, not merely the goods of *British* subjects purchased of the enemy, but even the goods of the enemy themselves, might be legally insured, and the legislature has frequently found it expedient, in times of war, to interpose its authority to restrain such insurances (*b*). The cases of *Brandon* v. *Nesbitt*, and *Bristow* v. *Towers* (*c*) have gone the length, however, of disabling an alien enemy, or any other on his behalf, from maintaining an action on a policy on the property of such alien enemy But the question still remained, whether a *British* subject might insure goods purchased by him in the enemy's country, when the two following cases arising out of the same transaction, drew that question into a full discussion, which has terminated in setting it finally at rest, upon the sure foundation of law.

Bell v. *Gibson*, 1 *Bos. & Pul.* 345

Goods the produce of *Holland* are purchased there during hostilities between *Great Britain* and *Holland* for a *British* subject, and shipped for *England*.—Such goods may be legally insured in *England*.

The first of these cases was an insurance on goods on board the *Elizabeth*, from *Rotterdam* to *Hull*.—In an action on this policy, brought in the court of *Common Pleas*, it appeared that the *Elizabeth* was a neutral ship, captured by the *French*, and the goods lost; that the plaintiffs had on board a quantity of madder purchased for them, and on their account, at *Rotterdam*, by their agent, a *British* subject resident there; that at the time the goods were purchased and shipped, and also at the time the insurance was effected, open hostilities existed between *Great Britain* and *Holland*; that during all that

(*a*) Vid. the arguments and authorities in support of this doctrine, in the very learned and eloquent judgment of Sir *William Scott*, in the case of the *Hoop*, 1 *Rob.* Adm. Rep. 201.—— (*b*) Vid. sup. 30.——(*c*) *Sup.* 36, 37.

time,

time, it was the conſtant practice to enter goods at the Cuſtom-Houſe here, direct from *Holland*, and this was never impeded, though the officer knew from whence they came, as he always enquired whether they were alien's goods, on account of the alien duty."—Upon this caſe it was inſiſted, on the part of the defendant, that this inſurance, was illegal, becauſe a *Britiſh* ſubject could not lawfully carry on any commerce with the King's enemies.—But the court (*a*) held that the inſurance was legal.

Potts v. Bell. 8 *T. R.* 548.

But it is now ſettled that ſuch trading is illegal, and the inſurance upon it void.

The other caſe, which was on the ſame policy, was alſo tried in the court of Common Pleas, and there was a verdict for the plaintiffs. A bill of exceptions was tendered on the part of the underwriter, and allowed, upon which the ſame facts appeared as in the former caſe.—The cauſe was removed by writ of error into the *King's Bench*, and after two arguments, firſt by common lawyers, and again by civilians, the court, after time taken for conſideration, were unanimouſly of opinion that it was illegal for a *Britiſh* ſubject to trade with an enemy, without the King's licence, and that the inſured, therefore, could not recover on the policy.

The terms of the King's licence to trade with the enemy muſt be ſtrictly purſued.

The following caſe will ſhew, that even if a *Britiſh* ſubject obtain the King's licence to trade with the enemy, he muſt ſtrictly conform to the terms and conditions annexed to ſuch licence; otherwiſe the trading will be illegal.

Vandyke v. Whitmore, 1 *Eaſt* 475.

A licence to trade with the enemy provides that the party ſhall give bond for the due exportation of the goods to the places propoſed; and they are exported without ſuch bond:—ſuch exportation is illegal.—If ſuch licence be granted for a limited time, it is not ſufficient:

Two policies were effected on goods the property of the plaintiffs, who were *Britiſh* ſubjects, upon a voyage from *London* to *Rotterdam* or *Amſterdam*, with or without clearances to or from a neutral port; the one being upon ſugar, on board the *Vlerland* and the *Lydia*, the other on coffee, ſugar, and tobacco, on board the ſame ſhip *Lydia*, both being neutral ſhips.—In an action on theſe policies, it appeared that on the 20th of *December* 1797, the plaintiffs obtained an order of council to export 100 hogſheads of tobacco in the *Lydia*,

(*a*) Mr. Juſtice *Buller*, Mr. Juſtice *Heath*, and Mr. Juſtice *Rooke*:—Lord C. J. *Eyre* was abſent.

 from

the goods be shipped within the time; if the ship fail after the time.

from *London* to *Calais* or *elsewhere*, as circumstances might require; with a proviso, (amongst others), that this licence should remain in force *for two months and no longer*; that the plaintiffs shipped 30 hogsheads of tobacco, part of the goods insured, entered them at the custom-house for *Calais*, made oath that they were to be exported to that place, and gave bond, according to the stat. 39 *G.* III. c. 68. (the tobacco act), to land this tobacco there; that the rest of the goods insured were shipped for *Rotterdam*, under an order of council of the 10th of *January* 1798; that on the 7th of *April* 1798, the *Lydia* was cleared out for *Calais*, *Rotterdam*, and *Embden*, and on the 14th sailed direct for *Rotterdam*; that the *Vlerland* arrived safe at *Rotterdam*, but the *Lydia* was captured off the mouth of the *Maese* by a *French* privateer; that by an order of council, dated the 3d of *September* 1796, reciting the statutes 33 *G.* III. c. 27. and the 34 *G.* III. c. 9. & 79. a licence was granted, according to the authority given by those acts, to export any of the goods mentioned in those acts to *Holland*, the *Austrian Netherlands*, or *Italy*; provided such goods were exported in neutral ships, and *under the usual conditions and regulations*, and that security should be given, *by bond*, that such goods should be exported to the places proposed, and a *certificate* produced within six months of their having been landed at that place; and that the proof of compliance with the conditions of the order should be on the persons claiming the benefit of it; that this order was by an order of the 10th of *January* 1798, continued to the 25th of *June* 1798, which was subsequent to the capture of the *Lydia*.—Upon this case the court determined that the plaintiffs were not entitled to recover.—Lord *Kenyon*, in delivering the opinion of the court said;—"The plaintiffs obtained the order of council of the 20th of *December* 1797, for the purpose of shipping the tobacco and other goods therein mentioned for *Calais*. But that licence will not affect the decision of this case; because it was confined to the *loading, supplying, and delivering*, in the *Lydia*, the goods specified, within two months," (that is from the 20th of *December* 1797), and the ship did not fail

sail till the 7th of *April* 1798. Therefore, whatever might have been the intention of proceeding to *Calais* after going to *Rotterdam*, the licence having expired before the voyage commenced, the exportation of the goods could not be protected by it. In this view of the case it becomes unnecessary for us to give any opinion upon the operation of the tobacco act. The question is, then, narrowed to the construction of the order of council of the 3d of *September* 1796, continued beyond the period in question. Though the King may, at common law, licence a trading with the enemy generally, yet he may also qualify his licence; in which case the party seeking to protect himself under such licence, must conform to the requisitions of it. Now the order of council of the 3d of *September*, licensing the trading to the *United Provinces* is on this express condition, that bond be given, in the form prescribed, that the goods shall be exported to the places proposed, and to no other; and that a certificate shall be produced within six months, that the goods have been landed; which condition has not been complied with, no such bond having been given. The plaintiffs therefore cannot protect themselves by that licence; consequently the voyage was illegal, and cannot be insured."

This objection must be taken, if at all, in the first instance.

If an underwriter would object that the policy was on a trading with the enemy, he must do so in the first instance; for if there be a verdict against him, the court will not grant a new trial to enable him to prove the fact of a trading with the enemy, in order to avoid the contract (*a*).

Sect. V.

The Wages and Effects of the Master and Mariners.

Seamen are not to be paid more than a moiety of their wages abroad.

IT seems to be the policy of all maritime states to use every precaution to prevent the desertion of the seamen, to interest them in the preservation of the ship, and to

(*a*) Vid. *Gist* v. *Mason*, sup. 36.

incite

incite them to the moſt vigorous exertions in times of danger. With this view the ſtat. 8 *G.* I. c. 27. § 7. was made, to reſtrain maſters and owners of ſhips from paying the ſeamen, beyond the ſeas, above one moiety of the the wages due to them, at the time of ſuch payment, before the ſhip's return to *Great Britain* or *Ireland*.

Nor can the ſeamen inſure any thing in nature of wages.

The ſame wiſe policy has alſo prohibited the inſurance of ſeamen's wages in all maritime countries; and by the law of *England* (*a*), a ſeaman is not permitted to inſure any thing in nature of wages.

Wolſter v. *De Taſtet*, 7 T. R. 157.

A mate of a ſlave ſhip, who is to have ſome privilege ſlaves, cannot inſure them, being in the nature of wages; and therefore he cannot recover againſt his agent for negligence in not procuring ſuch inſurance to be effected.

As where an action was brought againſt an agent for neglecting to make an inſurance according to inſtructions, and it appeared at the trial, that the plaintiff had been hired to go as mate in a ſhip from the coaſt of *Africa* to the *Havannah*, for which he was to receive 5*l.* per month, as wages, and three privilege ſlaves free of expence. The ſhip was loſt on her voyage, and the plaintiff proved that he thereby ſuſtained a loſs of 150*l.*, reckoning 39*l.* 5*s.* for his cheſt and clothes, and the reſt for the value of the ſlaves.—It was objected that the plaintiff could not recover the value of the ſlaves, they being in the nature of wages, and, therefore, not the ſubject of a legal inſurance.—A verdict for the plaintiff was taken, however, for 150*l.*, with liberty to the defendant to move to reduce the damages to 39*l.* 5*s.*, the value of the cheſt and clothes.—Upon this motion being made, the court were clearly of opinion, that the ſlaves were not the proper ſubject of an inſurance; and that though, in point of fact, theſe ſlaves were frequently inſured, and the loſs always paid by the underwriters, without diſputing the queſtion;—yet the court were of opinion, that as the objection was made, the plaintiff could not recover in this action more than he could have recovered in an action againſt the underwriters. The verdict was therefore reduced to 39*l.* 5*s.*

The following caſe reported by *Emerigon* (*b*) ſeems to have been decided upon ſound principles.—A ſeaman,

(*a*) Vid. 1 Mag. 18. Adm. in *Carter* v. *Boehm*, 3 *Bur.* 1912. 1 Bl. 594.——(*b*) *Emerig.* tom 1. p. 236.

who was engaged for a voyage, while the ſhip was in a foreign harbour, threatened to leave her, unleſs his wages already earned were ſecured to him. The captain gave him a note by which he undertook *to pay him his wages then due to him at all events*. The ſhip was afterwards taken.—The ſeaman, on his return to *France*, ſued the captain on his undertaking. The captain alledged that this undertaking was againſt law, and that he only gave it to prevent the ſeaman from deſerting the ſhip.—This was conſidered as a juſt and proper anſwer to the ſeaman's demand, and his ſuit was diſmiſſed with coſts.

But they may inſure goods purchaſed abroad with their wages.

But although the ſeamen are not permitted to inſure their wages, as ſuch; yet, in moſt foreign countries, they are allowed to inſure ſuch goods as they purchaſe with the wages they receive abroad; and there ſeems to be no reaſon why they ſhould not have the ſame indulgence in this country, as the reſtraint is meant only to apply to ſuch wages as are not due till the voyage is entirely finiſhed (*a*).

The captain may inſure his goods on board, or his ſhare in the ſhip.

Though the policy of the law tends to reſtrain all inſurances whereby the intereſt of the ſeamen in the care and preſervation of the ſhip may be leſſened, yet our law concurs with that of *France* in allowing the captain to inſure goods which he has on board, or his ſhare in the ſhip, if he be a part owner (*b*).—Upon this principle it has been determined, that the governor of a fort in a foreign ſettlement, in time of war, may inſure the fort for a period of time, againſt its being taken by a foreign enemy (*c*).

Upon the ſame principle, a governor may inſure a fort againſt capture by an enemy.

Sect. VI.

Freight.

In France the inſurance of freight is prohibited, except freight already earned.

BY the law of *France*, always watchful to prevent the contract of inſurance from ever becoming lucrative to

(*a*) Vid. *Emerig.* tom 1. p. 235.——(*b*) *Emerig.* tom 1. p. 236.——(*c*) Per Lord *Mansfield* in *Carter* v. *Boehm*, 3 *Bur.* 1905. 1 *Bl.* 593. *Inſ.* c. 11. ſ. 2.

the

the insured, the insurance of freight, not actually earned, is prohibited. One reason assigned for this is, that the master may be thereby rendered more careful in the preservation of the ship and cargo; another is, that freight is of the nature of profit, and, till it be acquired, the owner of the ship has not an insurable interest in it. But, by a declaration of the *French* government in 1779, freight, *actually earned*, was permitted to be insured; and it was provided, that in case of loss, it should not be included in the abandonment of the ship, unless it were expressly so stipulated in the policy. But freight, though actually earned, can in *France* be insured only by the *freighter*, where he agrees to pay the freight at all events. It is, in that case, an expence which he must pay if the ship should be lost without completing her voyage, and therefore a fair subject of insurance (*a*).

In England, the freight as well as the ship may be insured.

But the mere insurance of a ship, let out on freight, would afford the owner but an inadequate protection, where the loss of freight follows that of the ship. In *England*, therefore, the freight, as well as the ship, may be legally insured. And this is conformable to the practice in *Italy* (*b*).

But the insured can only recover for a loss of freight, where the risk on freight has been commenced.

To entitle the owner, however, to recover for a loss, on a policy on freight, it must appear that, before the loss, the owner's right to freight had commenced; that is, that the ship had actually begun to earn freight, for till then the risk on freight does not commence. Therefore, if the cargo be ready to be put on board, but the ship is lost while preparing for the voyage, the insured shall not be entitled to recover for the loss of freight (*c*). But if part of the cargo be shipped, there is then an inception of the risk on freight, and the insured, upon a valued policy, shall recover for the whole freight (*d*). So, if the ship sail on her voyage to the port where she is

(*a*) Vid. *Le Guidon*, ch. 15. art. 1. *Valin*, art. 15. p. 58. *Pothier*, h. t. n. 36. *Emerig.* tom. 1. 225.——(*b*) *Roccus*, not. 96.——(*c*) Per *Lee*, C. J. in *Tonge* v. *Watts*, inf. c. 7. s. 6.——(*d*) Per Lord *Kenyon*, in *Montgomery* v. *Eggington*, inf. c. 7. s. 6

to take in her cargo, this shall be a commencement of the risk on the freight, and, if the ship be lost before her arrival at her port of loading, the insurer on the freight is liable (*a*). See this subject more fully treated, post, ch. 7. § 6.

Sect. VII.

Slaves.

THERE is something extremely offensive to humanity in the idea of any part of the human species becoming property, and a subject of commerce, capable of being bought and sold like beasts of burthen. And yet it is to be lamented that this traffic has existed in all ages, even amongst the most polished nations of the world, and where moral refinements were the most highly cultivated. Slaves formerly insured as goods.

For upwards of two centuries, a commerce in negro slaves has been carried on by the several maritime states of *Europe*, for the purpose of supplying their colonies in *America* and the *West Indies* with labourers. The unfortunate objects of this cruel traffic were formerly too much considered as mere merchandize. The merchant insured them as such, and, with us, till lately, he was protected by the policy against any loss sustained in the voyage, even by mortality, if it could, by any construction, be attributed to any of the perils mentioned in the policy. At length, however, the *British* legislature, roused by the calls of humanity, has interposed; and though it was not thought wise at once to abolish this trade altogether, it was subjected to many wholesome restraints, not only in the manner of carrying it on, but also in the insurance of it. The object of these regulations was to interest the persons concerned in the transporting of slaves from *Africa* to the *West Indies*, in their health and preservation.—At length, however, the two houses of parliament in the month of *June* 1806, seve- How this trade was regulated. Now totally abolished by 47 G. 3. c. 36.

(*a*) *R. Thompson* v. *Taylor*, inf. c. 7. f. 6.

rally resolved that they would, with all practicable expedition, take effectual measures for the abolition of this trade; and in pursuance of these resolutions, the stat. 47 *G.* III. c. 36. was passed in the next session of parliament, totally abolishing the *African* slave trade from the 1st of *May* 1807, and subjecting all persons concerned in the continuance of it, after that time, to certain penalties and forfeitures. And § 5 prohibits and declares unlawful, all insurances upon any trading in slaves, and imposes a penalty of 100*l.* and treble the premium, upon any of his Majesty's subjects who shall subscribe, effect, or make any such unlawful insurances. But by § 6, the act shall not extend to a trading in slaves exported from *Africa* in ships cleared out before the 1st of *May* 1807, and landed in the *West Indies* on or before the 1st of *March* 1808.

Sect. VIII.

Profit.

How insurable abroad.

MUCH doubt has arisen upon the question, whether the profit expected to arise upon maritime commerce be a proper subject of insurance.

In estimating a total loss upon goods insured by an open policy, it has been the uniform practice, to add to the prime cost of the goods, all duties and expences, together with the premium of insurance; and the amount of these has always been holden to be a full indemnity. Nor is there any instance of profit being avowedly added, even where the loss has happened at the port of delivery. For instance, if 1000*l.* be insured on goods, which are lost in the port of delivery, before they are landed; and it appear that the invoice price, together with all charges and the premium of insurance, amount to 800*l.*; but the goods, at the time of the loss, had they been safely landed, would have been worth 1000*l.* the sum insured; yet the loss would be estimated at no more than 800*l.* On the other hand, supposing the goods would have fetched

' fetched no more than 600*l.* still the insured would have been entitled to the whole 500*l.* So that, whether the goods arrive at a rising or a falling market, the loss to be paid by the underwriter is the same.—And upon this ground it has been repeatedly holden that the underwriters shall not be involved in the rise or fall of the market (*a*).

Two reasons may be assigned for this;—*first*, that it is impolitic to allow the insured so completely to cover himself by the policy, as to divest himself of all interest in the preservation of the effects insured;—and *secondly*, the difficulty of ascertaining the true amount of the loss, where profit, which is so precarious, is to be taken into the account.

But if a policy on the *goods* will, in no instance, afford protection to the insured against the loss of profit, may it not reasonably be asked, how the profit itself can be separately insured?

It may, perhaps, be contended that, unless profit may legally be insured, the merchant cannot in any manner, secure to himself a full indemnity against the losses to which he is exposed by the perils of the sea. But this is not sufficient to countervail the objections to this species of insurance.—Besides, it is the policy of most commercial countries, to oblige the merchant himself to run some part of the risk, even on the ship and goods; and his running, himself, the risk of profit, may sometimes be attended with salutary consequences. The law of *France* not only prohibits the insurance of profit, but restrains the merchant from insuring more than nine-tenths of his interest; thus obliging him to run the risk, not only of all profit, but of one-tenth, also, of his goods.

Yet, in *Italy* the merchant is permitted to insure the profit he expects to derive from the goods he exports (*b*). *Roccus*, inquiring how a loss upon goods is to be estimated, thus expresses himself;—' *Distingue,—aut merces fuerunt* ' *æstimatæ, pro certâ quantitate, tempore contractûs assecura-*

(*a*) Vid. inf. ch. 14. s. 2.——(*b*) *Targa* c. 42. n. 5. *Santerna*, part 3 n. 40. *Roccus* h. t. n. 31.

' *tionis* :

'tionis; et tunc non sumus in dubio, quia dicta quantitas 'estimata solvenda est; aut assecuratio fuit facta pro asportandis mercibus salvis Romam, ET TUNC ÆSTIMATIO 'INSPICIENDA EST ROMÆ. *Aut assecuratio fuit facta* 'SIMPLICITER, *de solvendo æstimationem seu valorem mercium in casu periculi, si navis perierit, et tunc inspici 'debet tempus obligationis, et prout tunc valebant, debet fieri 'æstimatio; et sic damnum quod assecuratus patitur in amissione rei, non* LUCRUM *faciendum consideratur* (a).'— Hence it would seem that there were in *Italy*, when *Roccus* wrote, two forms of insurance; the one where the goods were valued, and then, in case of loss, the amount of the valuation was to be paid; the other, where the insurer contracted for the safe delivery of the goods *at the port of destination*, in which case the loss was estimated at the price the goods would have fetched had they arrived safe at the port of delivery.—In *Portugal*, also, profit is deemed a proper subject of insurance (b).—The *French* ordinance of the marine (c), on the contrary, adopting the rule of the *Roman* law, '*Detrimenti non lucri, sit præstatio* (d),' prohibits the insurance of profit. Nothing, indeed, in *France*, seems to be deemed a proper subject of insurance, but the ship, and such effects on board as are the absolute property of the insured, at the commencement of the risk. Profit, therefore, being precarious, and depending upon the uncertain event of future traffic, does not come within that description (e).—In *Holland*, no insurance upon expected profit can be legally made (f); but this restriction, it would seem, is by positive law; notwithstanding which, the practice of insuring expected profit has so generally obtained, that, in a case reported by *Bynkershock* (g), it appears that, upon an insurance on profit, a majority of the judges of the

(a) *Roccus* h. t. n. 3.——(b) *Santerna*, p. 3. n. 40, 41.——(c) h. t. art. 15.——(d) *Dig.* lib. 14. tit. 2. *de lege Rhodia, de jactu*, f. 4.—Vid. *Bynk. quæst. jur. priv. lib.* 4. c. 5. in which he cites a decision of the senate of *Rotterdam*, to shew that *lucrum quod speratur assecurari non posse*.——(e) Vid. *Emerig.* tom. 1. p. 232. *Pothier*, h. t. n. 36. 149.——(f) *Bynk.* quæst. jur. priv. lib. 4. c. 5.——(g) Ubi sup.

tribunal determined in favour of the insured; and those who opposed that decision, rested their opinion on positive law, and not on the ground that such contracts are inconsistent with the nature of insurance. It cannot, however, be contended that, because a particular practice has been prohibited by positive law, therefore it was legal before. The famous ordinance of the marine is a positive law; but it defines and enacts those very principles that were before received and admitted as maritime law in every state in *Europe*, with only a few modifications suited to the particular views of the *French* government. Our stat. 19 *G.* II. c. 37. certainly does not prove that, before the passing of that act, gaming insurances were legal contracts at common law (*a*).

In *England* there is no positive law prohibiting the insurance of profit, unless it be deemed to come within the restrictions of the stat. 19 *G.* II. c. 37; but, by the following determinations, it seems to be now settled that the insurance of expected profit is legal in this country.

Grant v. *Parkinson*, M. 22 *G.* 3. B. R. MS.

Profit expected to arise from a cargo of goods may be insured.

The first of these was an insurance, 'Upon any kind 'of goods on board the ship *Providence*, at and from '*Surinam* to *Quebec*. The said goods for so much as 'concerns the insured, by agreement are valued at '1000*l.*, *being the profits expected to arise on the cargo of 'the above ship, in the event of her safe arrival at Quebec*; 'and, in case of loss, the insurers agree to pay the 'same, without any other voucher than the policy.'— The interest proved at the trial was the *profit*, to the amount of the sum insured, which would have arisen to the plaintiff, upon a cargo of molasses, he having a contract with government to supply the army in *Canada* with spruce beer.—It was objected at the trial that profit was in its nature too precarious and uncertain to be the subject matter of an insurance; and that this, therefore, was a wager policy, within the stat. 19 *G.* II. c. 37.— This point being reserved for the opinion of the court, it was determined in favour of the plaintiff.—Lord *Mansfield* said,—" On the construction of the act, a valued

(*a*) Vid. inf. c. 4. s. 2.

policy is not void. Since the act, it is incumbent on the plaintiff to prove *some interest*; but it is not necessary for him to go into the whole value. The insurance being on the profits of a cargo belonging to a man having a contract to supply the army, if it arrived safe, the profits were pretty certain. This cannot be distinguished from a valued policy; and there is no pretence to say that it was a wagering one. The meaning of the valuation in the policy was, not to evade the act, but to avoid the difficulty of going into the exact amount of the *quantum*."

One principal ground of this decision was, that this was a valued policy, in which, provided the object of the contract be not a wager, any qualified property in the goods insured, or any reasonable expectation of profit or advantage to arise therefrom, will amount to an insurable interest. But this supposes that that which cannot be insured in an open policy, may be insured in a valued one; a proposition which will not readily be admitted.—Had the policy been an open one, it would have been extremely difficult to form any just estimate of the loss. The insured might have calculated it upon the probable gain which he might have made of the molasses, when employed in the making of spruce beer, and charged to government according to his contract. The underwriter might think, and perhaps with more reason, that the difference between the invoice price and charges, and the market price at the port of delivery at the time of the loss, was the only fair measure of profit for which the insurer ought to be liable. But, it is a settled rule, that when there has been a partial loss, there is no difference betwen a valued and an open policy. Supposing, then, that the goods from which the profit is expected to arise, should, after sustaining a partial loss, come to a losing market; it would be impossible in that case to shew that the insured had sustained any loss within the policy; because, had the goods come safe to their port of destination, the insured could have gained no profit upon the sale of them.

The next case on this subject was an insurance on the ship *Jonah*, 'from *Barbadoes* to the coast of *Africa*, during 'her stay and trade there, and back to the *West Indies*.' The policy was declared to be *on profits*, valued at 2000*l.* —The declaration stated that the insured was *interested in profits to arise from the sale of the cargo*, to the amount of the sum insured, and stated a total loss by capture.—Upon the trial, it appeared—" That, after an insurance had been effected on the ship and cargo, sufficient to cover their full value and the amount of the premiums, the insurance in question was made; that the ship having arrived at her port of discharge on the coast of *Africa*, and when part of her cargo was sold and thirty slaves purchased, she was captured by the *French*, but was afterwards given up to one *Hewitt*, for the purpose of conveying *English* prisoners to a *British* port; that she afterwards arrived at *Sierra Leone* with the remainder of her cargo, the thirty slaves, and a number of prisoners, where *Hewitt* and part of the crew deserted her, and her original captain refusing to take charge of her, the governor gave the command of her to one *Scott*, who sold the thirty slaves and the rest of the cargo, and then sailed for *Barbadoes* with the prisoners; and that, upon her arrival at *Barbadoes*, the court of admiralty there adjudged to *Scott* and the crew, an eighth of the proceeds of the ship, and of the cargo that was on board at the time he took possession of her."—The court, after two arguments, determined that the plaintiff was entitled to recover as for a total loss.—Mr. Justice *Lawrence*, delivered the opinion of the court with great learning and ingenuity.—After expatiating on the reasonableness of permitting the insurance of expected profit, and using several arguments to shew that it is not inconsistent with the nature of the contract of insurance, cited several foreign authorities to prove that it is practised in most of the other maritime states, where it is not prohibited by positive law. He then said,—" It has been objected to this sort of insurance that the subject, having no physical existence, cannot be insured. This objection would hold against insuring freight, and bottomry, and respondentia inte-

Barclay v. *Cousins*, 2 *East* 544.

The profits expected upon a cargo of goods to be employed in the *African* trade, may be insured.

refts (*a*). It was alfo objected that the goods might be going to a lofing market, in which cafe the infured would gain by the lofs of his goods: But if that were the cafe, it would be evidence on *non affumpfit*, as it would prove that the plaintiff was not damnified, *as to profit*, by the lofs of the goods; or that, at the time of the lofs, he had no intereft *in the thing infured*. It was further objected that in the cafe of an infurance on profit, there can be no average or abandonment: But that objection does not hold in the prefent cafe; for if there be only a partial lofs, the infured will only be liable to pay for the expected profits on the goods loft, and there may be an abandonment of the profits, by abandoning the goods from whence the profits are to arife (*b*). As to general average, there would be no difficulty in the cafe of a valued policy: And, in the cafe of an open policy, the difficulty would be no greater than in afcertaining the damages, in cafe of lofs; the impoffibility of doing which, in *every cafe*, will not prove that an infurance can be made on profits in *no cafe*."

In delivering the opinion of the court in the foregoing cafe, Mr. Juftice *Lawrence* read a note of the cafe of *Henrickfon* v. *Margetfon*, which was determined in the

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(*a*) Bottomry and refpondentia interefts differ effentially from that of expected profit. A lender upon bottomry is liable to general average, and entitled to the benefit of falvage. He may infure to the amount of the fum lent, but not the intereft referved, which is, in truth, profit; and the borrower can infure only to the amount of the refidue of the value of the thing hypothecated. Vid. inf. book 2. ch. 3, 4——(*b*) It is not at all probable that an infurance would ever be made upon profits merely, without infuring the goods from which fuch profits are expected to arife; and then, upon a total lofs, the abandonment muft be, not to the underwriters upon profit, but to thofe upon the goods, who will of courfe be entitled to the entire proceeds of the goods fo abandoned, however thefe proceeds may exceed the prime coft or value in the policy. Vid. inf. ch. 13. f. 4. The cafe of *Thompfon* v. *Rowcroft*, 4 *Eaft*. 34., fhews how difficult it is to reconcile the claims of the underwriters upon freight with thofe of the underwriters upon the fhip, in the cafe of an abandonment.

Court

Court of King's Bench in *Mich.* 1776.—It was an insurance on indigo, valued at 9,600*l.*, at and from *Bourdeaux* to *Hamburgh*, with a memorandum at the foot of the policy, that it was on *imaginary profit*, at three and a half *per cent.*; and, in case of loss, to pay without further proof of interest than the policy.—There was an averment in the declaration that this ship did not belong to his Majesty or any of his subjects, and that the imaginary profit mentioned in the memorandum meant *the profit which the said cargo of indigo would produce, upon the sale thereof at Hamburgh, if the same should arrive there in safety*, and that the plaintiff was *interested in the cargo of indigo, and the imaginary profit thereof.*—Upon the trial it appeared that the ship was totally lost off *Scilly*; but that all the cargo, except one barrel of indigo, was saved and carried to *Hamburgh* in another vessel, at the expence of the underwriters.—There was a verdict for the plaintiff.—Upon a motion for a new trial, the question was, whether, the ship being lost, but the cargo carried to *Hamburgh* in another ship, the insured could recover as for a total loss of the profits.—The court determined in favour of the plaintiff, being of opinion that the underwriters were not at liberty to send the cargo to *Hamburgh* at what time and in what ship they pleased.—Lord *Mansfield* said:—"The meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo: But the market varies and may depend on twenty-four hours sooner or later; so that, unless the very ship and cargo arrive, the profit may fail, and the insurance is lost."

Henrickson v. Margetson, 2 *East* 549. n.

Insurance of *imaginary profit* of a cargo of goods on board a foreign ship. The ship being totally lost, the cargo is carried in another vessel to the port of delivery, at the expence of the underwriters.—Held, that this was a total loss.

It is observable that this was the case of a *foreign ship*, with a stipulation that, in case of loss, the underwriters should pay, "*without further proof of interest than the policy*;" and there was an express averment in the declaration that the ship was foreign, to take the case out of the stat. 19 *G.* II. c. 37. This shews that those who framed the declaration entertained apprehensions, at least, that if this had been the case of a *British* ship, it might have been holden to be a wager within that act. And Lord *Mansfield* seems in some measure to have treated it as a

wager: For though the memorandum in the policy, and the averment in the declaration, both shew that the insurance was upon the profit expected upon the *cargo* only; yet his lordship says that *the insurance was lost* by the non-arrival of the *very ship and cargo.* This alone can account for its being considered as a total loss; otherwise, as the cargo was carried to *Hamburgh* at the expence of the underwriters, it could only have amounted to a partial loss: For, as to the variation of the market, that may be favourable or unfavourable; and if this argument were to hold good in all cases, the consequence would be that, wherever the goods insured are, from whatever necessity, shifted from one ship to another, it will be a total loss, though they be delivered safe at the place of destination, which is contrary to a well known principle of the law of insurance (*a*).

But the insured must shew that he would have made profit, if the loss had not happened.

But in the last case that has occurred on this subject it was determined that the plaintiff cannot recover on a policy on expected profit, unless it be made appear that the insured would have made a profit by the adventure, if no loss had happened.

Hodgson v. Glover, 6 *East* 316.

The profits upon a cargo of slaves are insured in a valued policy. Part of the slaves are lost by shipwreck, and the rest arrive at a market.—The plaintiff cannot recover as for a total loss; nor even for a partial loss, without shewing that if all had come to market, profit would have been made of them.

In that case the plaintiff, at *Liverpool*, having received advice that his ship, the *Monta Lambert*, had arrived at *St. Vincent*'s with a cargo of slaves from the coast of *Africa*, effected a policy in *London* for 400*l.* 'at and from *St. Vincent*'s to 'the ship's last port of discharge, final sale and delivery, 'in all or any of the *West India* and *Bahama* islands, '*America*, and the *Havannah*;' and the insurance was declared to be '*On profits valued at the sum insured: And "in case of loss, no other proof of interest to be required* '*than that policy.*'—The ship sailed from *St. Vincent*'s for the *Bahamas*, and in this voyage was wrecked at the *Bahamas*, and the ship and many of the slaves were totally lost. The remainder of the slaves were carried in other vessels to the *Havannah*, and there sold by the plaintiff; but their produce did not give a profit upon the whole adventure.—Upon this case it was contended

(*a*) Vid. inf. ch. 5. s. 2. and particularly the case of *Plantamour v. Staples* there.

on

on the part of the defendant, that this policy was void by the ſtat. 19 *G.* II. c. 37. which prohibits inſurances, ‘ *intereſt or no intereſt, or without further proof of intereſt* ‘ *than the policy.*’—Mr. Juſtice *Lawrence* obſerved that the ſtipulation, as to the proof of intereſt, was an independent part of the agreement of the parties, which might be void and yet the other part of the contract of inſurance itſelf might be good; that though the latter ſtipulation was void, as being an agreement to preclude that proof which the law has made neceſſary; yet that the contract itſelf might be good if proved by legal evidence.—It was then further objected that the plaintiff had declared as for a total loſs, and it appeared that the greater part of the ſlaves had arrived ſafe at a market and had been diſpoſed of, and that there might have been a profit upon the part of the voyage which was inſured, though a loſs upon the whole adventure, which was from *Liverpool* to *Africa*, and from thence to the *Weſt Indies*; but the profits were only inſured from *St. Vincent*'s (after the ſhip's arrival there) to her laſt port of diſcharge.—The court held that the plaintiff was not entitled to recover.—The reaſons aſſigned for this deciſion were, 1ſt. That there could not be a total loſs, where a great part of the cargo reached a market; and, 2dly. that as the plaintiff had not ſhewn that any profit would have been made, even if no ſhipwreck had happened, and all the ſlaves had arrived ſafe at a market, he could not recover at all.

This caſe may, perhaps, be conſidered as an example of the difficulties likely to reſult from permitting the inſurance of profit.

CHAP. IV.

Of the Interest of the insured in the Subject Matter of the Insurance.

HAVING, in the two foregoing chapters, inquired what persons may be parties to the contract of insurance, and what may the subject matter of it; we will now proceed to examine the property, or *interest*, as it is usually termed, which the insured must have in the thing insured, to give validity to the contract. This may be done under the following heads;

I. *Insurable Interest*;
II. *Wager Policies*;
III. *Re-insurance*;
IV. *Double Insurance*.

Sect. I.

What shall amount to an Insurable Interest.

INSURANCE is said to be, '*a contract of indemnity* '*from loss or damage, arising upon an uncertain event.*' The object of insurance, strictly speaking, is, not to make a *positive gain*, but to avert a *possible loss*. A man cannot properly be said to be *indemnified* against a loss which can never happen to him. There cannot be an indemnity without a loss, nor a loss without an interest. A policy, therefore, without interest, is not an insurance, but only a mere wager. Of such wagers we will treat at large in the next section. At present we will consider what interest in the thing insured, the law of *England* deems sufficient to give validity to the contract.

It

Qualified property.

It would be extremely difficult to give any accurate definition of insurable interest. The interests of commerce, and the various and complicated rights which different persons may have in the same thing, require that not only those who have an *absolute* property in ships and goods, but those, also, who have a *qualified* property therein, may be at liberty to insure them; and this principle has been carried so far, that if a merchant abroad, in order to secure the payment of a debt due to his correspondent in *England*, mortgage to him his interest in certain goods and freight; the correspondent, after the mortgage becomes absolute, may insure the *legal* interest on his own account, or the *equitable* interest on account of the mortgagor (*a*).

Different persons having each a qualified property in goods, may insure them to the full value.

As, where *A.* a merchant at *Petersburgh*, wrote to *B.* his correspondent in *London*, to whom he was indebted, informing him that he had shipped a quantity of goods for *London*, consigned to him, and would send him the bill of lading, and desired him to insure them. *B.* immediately did this; and *A.* having shipped the goods, instead of sending the bill of lading to *B.*, indorsed it, for a valuable consideration, to *C.* at *Petersburgh*, who transmitted it to *D.* his correspondent in *London*, with directions to insure, which *he* also did; but apprised the underwriters of the former insurances made on the same goods by *B.*—In this case it was determined, upon great consideration, that each had an insurable interest.

Godin v. *Lond. Assur.* 1 *Bur.* 489. 1 *Bl.* 103. inf. f. 4.

The following case will further illustrate the same principle.

An insurance was made on goods, 'At and from '*Jamaica* to *London*;' and it was stated at the head of the policy, to be, '*on account of Robert Kerr*, Esq.'—The plaintiffs were merchants in *London*, and the general consignees of *Kerr*, a planter in *Jamaica*; and were in the constant habit of getting his goods insured. On the 23d of *December* 1782, they received advice from him by letter, dated the 18th of *October*, of his having shipped ten hogsheads of sugar on board the *Devonshire*, with general

Hibbert and others v. *Carter*, 1 T. R. 745.

The indorsement of a bill of lading to a creditor, is payment *pro tanto*, and conveys *prima facie*, the whole property in the goods from the time of delivery. But if it be only to bind the net proceeds, the indorser has still an insurable interest.

(*a*) Per *Ashhurst*, J. in *Smith* v. *Lascelles*, 2 T. R. 188.

general directions to insure whatever goods were shipped by him.—The insurance in question was immediately effected; but between the time when the order was sent, and the effecting of the policy, *Kerr* indorsed the bill of lading to one *Dellprat*, to whom he was indebted, and informed the plaintiffs of this by letter. The bills of lading, as they originally stood, expressed the sugars to be shipped on the account and risk of "*the shipper*," with directions to deliver to his order, or that of his assigns. The indorsement was in these terms:—"Deliver the "above sugars to Mr. *J. Hodgson*, for account of *S. Dell-* "*prat, Robert Kerr*."—The ship was lost.—In an action on the policy, the plaintiffs rested their case on the above facts.—The defendant objected that *Kerr*, having assigned the bill of lading before the insurance was actually effected, the averment in the declaration that these sugars had been insured *on his account*, was not true; for he had not then any insurable interest in him, the entire property having passed out of him by the assignment of the bill of lading, which operated in this instance as a payment.—Mr. Justice *Buller*, who tried the cause, being of this opinion, would have nonsuited the plaintiffs: But the defendant having neglected to pay the premium into court, they took a verdict for that sum.—They moved, however, for a new trial, insisting that the verdict ought to have been for the *whole* sum insured.—But the court determined that the plaintiffs were not entitled to recover for any *loss* in this case, being all clearly of opinion, that where a bill of lading is taken by a creditor as a security for his debt, on his own account, the whole property passes by the delivery, and is to be considered as a satisfaction of the debt, *pro tanto*: But, that the parties are always at liberty to vary from the general rule, by entering into any particular agreement between themselves; which, however, must be shewn, in order to take advantage of it.—Afterwards the motion was renewed, by leave of the Court, on an affidavit stating the particular transaction between the parties; viz. That *Kerr* had no intention to pass the whole *property*, by the indorsement of the bill of lading; but only *to bind the consignment*; for which purpose he had ordered the plaintiffs to pay the

net

net proceeds to *Dellprat*; and that since that time, *Kerr's* executors had accounted to *Dellprat* for the amount of the sugars that had been lost, a demand having been made on them for that purpose. Upon these new facts, a new trial was granted without opposition (*a*).

A reasonable expectation of profit, or a well-founded expectation of a future interest in the thing insured, is an insurable interest.

It is said that in a case where the interest was declared to be, "*on the commissions of the insured*, as consignee of the cargo, valued at 1500*l.*" Lord *Kenyon* expressed a very strong opinion that this was a good insurable interest (*b*). In the case of *Grant* v. *Parkinson* (*c*), it was determined that a reasonable expectation of profit, though it be not a vested property, is an insurable interest. Upon the authority of that case, it has since been determined, that the possession of the things insured, and a reasonable expectation of a future interest therein, though depending on the pleasure of the crown, is an insurable interest. Of this nature is the interest which the captor acquires in a prize regularly taken in war. From the moment that the victor hoists his flag on board the conquered ship, he has acquired a qualified property in her which he may insure (*d*). For though the King is, in contemplation of law, the captor, and the property of every prize immediately vests in him; yet the practice of bestowing all prizes taken from the enemy upon the officers and men, who are the persons immediately concerned in the capture, is so constant and uniform, that the law will consider the expectation, founded upon this practice, as equivalent to a vested interest.

(*a*) Vid. *Caldwell* v. *Ball*, 1 *T. R.* 205.——(*b*) *Flint* v. *Le Mesurier*, at N. P. after *Hil.* 1796, *Park* 268.——(*c*) Sup. 97.——(*d*) *Item quæ ex hostibus capiuntur, jure gentium statim capientium fiunt.* Dig l. 41. tit. 1. f. 5. n. 7. *de acquir. rer. dom.*—*Un prise que fait en tems de guerre un vaisseau corsaire, autorisé pour aller en course, est un profit acquis aussitôt qu'elle est fait: C'est pour quoi le propriétaire du vaisseau corsaire peut le faire assurer pour tous les dangers qu'elle court, jusqu' à ce qu'elle soit amenée dans un port de* France. Pothier, *h. t. n.* 38.

Thus:—

LeCras v. *Hughes,* *B. R. E.* 22 *G.* 3. MS.

The captors, upon a joint capture by sea and land forces, have an inſurable intereſt in the prize, before condemnation.

Thus:—Where an inſurance was made on the ſhip *Saint Domingo,* and her cargo, valued at the ſum inſured 'At 'and from *Omoa* to *London;*' and it appeared, that Captain *John Luttrell,* with a ſquadron of men of war, and Captain *Dalrymple,* with a party of land forces on board, captured two *Spaniſh* regiſter ſhips, lying under the protection of *Fort Omoa,* together with the fort itſelf, which were a joint capture to the ſea and land forces; that the *Saint Domingo,* one of the regiſter ſhips, on her voyage to *London,* laden with the captured property, was, together with a great part of her cargo, loſt by the perils of the ſea; and that the intereſt intended to be recovered by the policy, was that of the *officers and crews of the ſquadron.*—There were other policies on the ſame ſhip and goods amounting in all to 99,500*l.*—The principal queſtion was, whether, by the *Spaniſh* prize act (*a*), the captors had an *inſurable intereſt* in theſe prizes.—On the part of the underwriters, it was objected that, as this was a joint capture by the ſea and land forces, the ſoldiers had not only no ſhare, but prevented the navy from having any; for, as the act had not provided for ſuch a capture, the whole veſted in the crown.—But the court determined that the plaintiff had an inſurable intereſt.—Lord *Mansfield,* in delivering the opinion of the court, ſaid,—"There are two queſtions in this cauſe; *firſt,* Whether the ſea officers had an inſurable intereſt, and this will depend on the prize act and proclamation; and, *ſecondly,* Whether poſſeſſion, and the expectation of future benefit, founded on the contingency of a future grant from the crown, but warranted by almoſt univerſal practice, would amount to an inſurable intereſt. As to the firſt, the act gives to the officers, ſeamen, marines and ſoldiers on board every ſhip of war, the ſole property in all ſhips and goods which they ſhall take during the war, after condemnation. So that the act does not ſay that the ſeamen only ſhall take, nor does it leave a joint capture by the army and navy altogether undefined. It is like the caſe of a capture by a

(*a*) Stat. 19 *G.* III. c. 67.

combined

combined fleet. I remember such a case, but the *English* sailors could not claim the whole, nor could the act mean that they should have nothing. The same observation might be made on a joint capture by the King's ships and privateers. For such cases there is no provision in the act, and yet, no doubt, the navy is entitled. Where soldiers assist, their right may be doubtful, but that does not lessen the right of the navy.—As to the second ground, the crown always makes the grant, and there is no instance to the contrary.—Probable profit may be insured, and the case of *Grant* v. *Parkinson* (*a*), where an interest, *not vested*, was holden to be insurable, is an authority in point. On either ground, therefore, the plaintiff has an insurable interest (*b*)."

The case of *Grant* v. *Parkinson*, went much farther than this. In that case there was neither a vested interest nor possession of that in which the interest was claimed, but only a bare expectation of profit: Here, there was a vested interest, a possession, and a responsibility to the owner, if it should turn out that the capture was illegal.

Trustees having the disposal of ships and goods according to the directions they may receive from third persons, may insure.

The following case shews that persons in the character of *trustees*, for the disposal of ships and goods according to such instructions as they might receive from third persons, may insure such ships and goods for the benefit of the persons who may eventually be entitled to the produce of them.

Craufurd and others v. *Hunter*, 8 T. R. 13.

Commissioners being authorized by statute to take into their care all *Dutch* ships, &c. detained in *British* ports, and to dispose thereof according to directions from the privy council, may insure, in their own names, such ships, after seizure at sea, and while they are on their passage to *England*. —A count stating the nature of their trust, and

The stat. 35 G. III. c. 80. § 21., after reciting that several ships and vessels belonging to the subjects of the *United Provinces*, and others having on board goods and effects belonging to such subjects, had been, or might be, thereafter *detained in, or brought into the ports of this kingdom*, and such ships and cargoes might perish and be greatly injured if some provision were not made respecting the same, gives to his Majesty the power of granting 'a commission to three or more persons, authorizing them 'to take such ships and cargoes into their possession and 'under their care, and to manage, sell, or dispose of the 'same

(*a*) Sup. 97.——(*b*) See *Boehm* v. *Bell*, inf. ch. 15. s. 1. where the same point was admitted as clear law.

averring an interest in them *as commissioners*; or even without any averment of interest in any person, but with an averment that the ships insured '*did not belong to* '*his Majesty or* '*any of his sub*-'*jects*', is good.

'same to the best advantage, according to such instructions as they should from time to time receive from his 'Majesty, with the advice of his privy council.'—Commissioners being appointed under this act, and certain *Dutch* ships with their cargoes being seized at sea by one of his Majesty's ships, and carried into *St. Helena*, in order to be brought from thence to *England*, the plaintiffs, by the name of "The honourable commissioners for the sale of *Dutch* property," as well in their own names as in the names of all other persons to whom the same might appertain, made an insurance on these ships and goods, lost or not lost, at and from *St. Helena* to *London*.—In an action on this policy, the plaintiffs in their declaration, after stating the above facts, averred that the plaintiffs, *as such commissioners*, at the time of the sailing of the said ships from *St. Helena*, and from thence until the time of the several losses, *were interested* in the said ships and goods to the amount of the sums insured, and that the said insurance was made for their use, benefit, and account, *as such commissioners*. It then stated the sailing of the ships from *St. Helena*, and their subsequent loss by the perils of the sea, and that the plaintiffs as such commissioners sustained a partial loss of 40*l. per cent.*—The second and third counts were similar to this, but the one averred the interest to be in *his Majesty*, the other in the *Dutch East India Company*. The fourth count was also similar, except that it did not aver interest in any person; but merely stated that the policy was made by the plaintiffs to such commissioners, 'as well in their own names, as 'for and in the name or names of all and every other 'person or persons to whom the same did or might apper-'tain in part or in all.' It also contained this averment, that '*the said ships or any of them were not belonging to his* '*Majesty or any of his subjects*, before or at the time of 'making the policy, or at the several times of the losses 'happening; and that the plaintiffs were the persons who 'gave the orders and directions to the agent immediately 'employed to effect the policy.'—Upon a special demurrer to the first and fourth counts, it was objected, as to the first, (*averring the interest to be in the plaintiffs as commissioners*),

sioners), that they had, at the beginning of the adventure, and at the time when the insurance was effected, only an interest *in expectation* in the ships and goods, and that no case had ever gone so far as to determine that to be an insurable interest; that their authority to manage, sell, and dispose of the property, (from which alone an interest could arise to them), was not to commence till the arrival of the property in a *British* port, which event never took place, and consequently their interest never attached. And as to the fourth count, it was objected that it was *repugnant in substance*, in as much as it averred that '*none of the ships insured belonged to his Majesty or any* '*of his subjects*,' (which averment was made to take the case out of the stat. 19 *G.* II. c. 37. prohibiting wagering insurances on ships or goods *belonging to his Majesty or any of his subjects*); whereas these ships, being seized under his Majesty's orders, belonged to him: But at all events, it ought to have been specially averred in this count that there was an interest in some person, especially since the above act; and though the general allegation that the insurance was effected by the plaintiffs, for and in the names of all persons who might be interested, was large enough to comprehend all persons who were in fact interested, yet it could not be maintained that an insurance intended for the benefit of one individual, could be thus transferred to another.—But the court, after two arguments, were clearly of opinion that the plaintiffs were entitled to judgment on the first count, and that the second count was also good.—Lord *Kenyon* said:—"The ships having been seized at sea by his Majesty's ships of war were at *St. Helena*, and were to be brought to this conntry, to be put under the care, management, and disposal of the plaintiffs, as commissioners under the act. Being so seized, they could not come here under any other management, or to any other persons than the plaintiffs, *as trustees*. Then can a *trustee* insure? There is no doubt but he may. It was said, however, in the course of the argument, that there cannot be a trustee for the Crown: But that argument was soon abandoned, as untenable; and certainly it cannot be supported.

A Trustee, a consignee, or an agent for prizes, may insure.

Then

Then can a *consignee* insure? Surely he may. Can an *agent for prizes* insure? Certainly; and these plaintiffs are like agents for prizes. With one part of the case of *Le Cras* v. *Hughes* (*a*) I fully concur, and on that no doubt can be entertained, namely, that an agent for prizes, though he has not the possession, has such an interest in the ships coming home, that he may insure; and in so deciding, Lord *Mansfield* only proceeded on principles previously settled and established. Therefore, as well on the authority of that case, as on certain positions which must be admitted on all hands, I am of opinion that the plaintiffs are entitled to our judgement on the first count. The second question, whether or not the plaintiffs may declare in the manner in which the *fourth* count is framed, depends, I think, on the construction of the stat. 19 *Geo.* II. c. 37. Notwithstanding what has been said in the argument on behalf of the defendant, I think that, at common law, a person might have insured without having any interest. And this is in some measure proved by the case of *Goddart* v. *Garrett* (*b*). Since that, an application was made to the Court of Chancery to have the policy delivered up: For that Court sometimes relieves, as was said by Sir *J. Jeykell* in *Cowper* v. *Cowper* (*c*), against the rigour of the law, when certain circumstances are disclosed, to induce that Court to interfere. But the preamble and enacting part of the stat. 19 *G.* II. c. 37. remove all doubts on this point. It recites the mischief and inconveniences that had arisen from the making of insurances, interest or no interest, and then it *enacts*, (not declaring), that no such insurance shall be made, except in certain cases, which, for very wise and politic reasons, were excepted. Therefore I am satisfied that this count is good, unless it be on an insurance prohibited by the statute. But that statute only applies to "*ships* belonging to his Majesty or any of his subjects," and does not extend to foreign ships. The defendant's counsel then wished to consider these ships as belonging to the Government of this country: But that cannot be so considered, for

At common law, an insurance might have been made without interest.

(*a*) Sup. 108.——(*b*) 2 *Vern.* 269. inf. I. 2.——(*c*) 2 *P. W.* 753.

the

the property in captured ships is not altered before condemnation in the Court of Admiralty."—Mr. Justice *Ashurst* said,—"The principal question in this case is, whether the fourth count can be supported for want of an averment of interest in the plaintiffs in the subject-matter insured; as to which I am of opinion, that the declaration is good, without such an averment. For this is not a case that falls within the purview of the statute against gaming policies. But without entering into that, it is sufficiently clear, upon the first count, that the plaintiffs were interested. It is not necessary that there should be any technical form of words made use of by way of averment of interest; it is sufficient if the fact appear to be so. Suppose the subject of the insurance had been an enemy's ship, taken as prize, in time of war, by a King's ship, and the captain of such ship had insured her, I should conceive such insurance would be good. The information given to the underwriters by the plaintiffs, on the face of the present declaration, is matter of equal notoriety; for it shews the act of Parliament by which a power and authority were vested in the Crown for the several purposes therein mentioned, and that the plaintiffs were appointed commissioners by the King, to take care of such property, of a certain description, as might come into their hands, and that this was property of that description. This seems to be all that the underwriters could have occasion to know, and shews that the plaintiffs were in the nature of agents. The plaintiffs did not affect to make this insurance in their own right, but as trustees for those persons who should eventually be entitled to it."

The captain who makes a capture may insure his prize.

After this decision another action was brought on the same policy, and upon the general issue pleaded, the cause came on to be tried before Lord *Kenyon*, who, upon the same facts being proved, directed a verdict for the plaintiffs.—A bill of exceptions being thereupon tendered, and the record, with a statement of the facts proved, being removed into the *Exchequer Chamber* by writ of error, that court, after hearing the case three times argued, affirmed the judgment of the King's Bench.—In this case it was also determined, that the plaintiffs were entitled to recover

Lucena v. Crauford, 3 Bos. & Pul. 75.

Same point.

The plaintiffs were entitled to recover, though

the loss did not happen till after hostilities commenced.

cover for a loss upon such ships, by perils of the sea, though such loss did not happen till after a proclamation had issued for general reprisals against the *Dutch*.

In the case of a foreign ship, it is not necessary to aver interest.

In a subsequent case the point determined upon the fourth count of the declaration in *Crawford* v. *Hunter*, (*a*) was brought to a solemn decision; and the court, after two arguments, determined that, in an action on a policy on a foreign ship, the declaration need not aver any interest in the insured, though there be no such words as "*interest or no interest*" in the policy. (*b*)

The following case will shew that a mere *cestui que trust* of goods, without any legal title, may insure.

Hill & another v. *Secretan*, 1 *Bos. & Pul.* 315.

A. being indebted to B., without any order from B., consigns goods to C., to be held for B., and indorses the bill of lading to C.—B. has a good insurable interest in the goods so consigned to C.

An insurance was made on behalf of the plaintiffs, on goods on board the *San Bernardo*, "at and from *Andero* to *London*."—In an action on this policy to recover a loss by capture, it appeared that *De la Torré*, in *Spain*, had consigned 29 bags of wool to *Dubois* in *London*, and indorsed the bill of lading to him; but that, with the bill of lading, came a letter, directing *Dubois* to hold 15 bags for a house at *Halifax*, and the remainder for the plaintiffs at *Exeter*, which were the goods insured. It also appeared that *De la Torré* was indebted to the plaintiffs to the amount of 500l., but that they had given no orders for these goods; The only question was, whether the plaintiffs had an insurable interest.—It was contended on the part of the defendant, that as the bill of lading was not indorsed to the plaintiffs, and as *De la Torré* would still be liable for his debt to them, if the goods should not reach them, they remained the property of *De la Torré*, and the plaintiffs had no right in them.—But the court were clearly of opinion, that, as the goods were consigned to *Dubois*, to hold for the plaintiffs, he was to be considered as trustee for them; and that the plaintiffs, being creditors of *De la Torré*, raised a good consideration for the consignment, and the plaintiffs had a good insurable interest.

(*a*) Sup. 109. —(*b*) Vid. *Nantes* v. *Thompson*, 2 *East* 385, post, ch. 16. s. 2. Vid. also *Kellner* v. *Le Mesurier*, 4 *East* 396, 400. S. P.

If

If the consignor of a cargo of goods send the bills of lading, together with bills of exchange for the amount of of the cargo, to his general agent, with directions to deliver the bills of lading to the consignee, on his accepting the bills of exchange, and the consignee refuse to receive the goods or accept the bills of exchange; such general agent becomes in effect the consignee of the goods, and may insure them as agent for the consignor, or in his own right, if he have accepted bills on the credit of the goods (a).

A general agent upon the consignee's refusal to take the goods, may insure them in his own right if he have accepted bills on account of them.

From the authorities which have been already cited, it appears that, provided the object of the contract be not a wager, almost any qualified property in the thing insured, or any reasonable expectation of profit or advantage to arise therefrom, will constitute that sort of interest which the party may legally protect by insurance.—Still, however, an insurable interest must be founded on some legal or equitable title; and though a person may have a sort of *claim*, which, as between him and the legal owner, might be thought reasonable, and such as the legal owner could not conscientiously dispute; yet if this claim be inconsistent with the only title which the law can recognize, it will not be deemed to be even an equitable title, and therefore not an insurable interest.

But an insurable interest can only be founded on a legal or equitable title; and a mere claim which is neither legal or equitable, is not an insurable interest.

Thus:—In an action on a policy on freight valued at 5000l. there were two counts in the declaration. The first averred the interest to be in the three plaintiffs, *Camden*, *Calvert*, and *King*, in whose names the insurance was effected; the second averred it to be in the plaintiffs and one *Curtis*.—On the trial, it appeared that the ship had been paid for by the four persons named in the last count, to whom a bill of sale was made.—The defendant produced a register made in 1786, in pursuance of the stat. 26 G. III. c. 60, (*Lord Hawkesbury's* act), wherein the ship was registered in the names of *Camden* and *Calvert* only, and it was insisted that, as the plaintiff's title to freight could only arise from the ownership, the register

Camden & another v. *Anderson*, 5 T. R. 709.

Four Persons purchase a ship, which is only registered in the names of *two* of them; the *four* have not an insurable interest in the freight, having neither a legal nor an equitable title to the ship.

(a) R. *Wolf* v. *Horncastle*, 1 *Bos.* & *Pul.* 316. post. c. 8. § 3.

was decisive evidence that no other persons than those two were interested in the property (*a*); and there was no count in the declaration stating the interest to be in those two.—The plaintiffs, however, took a verdict, with liberty to the defendant to move to enter a nonsuit.—Upon this motion, it was contended on the part of the plaintiffs; *first*, that it was competent to *Camden* and *King*, in whose names the ship was registered and the bill of sale taken, to transfer their right by parol agreement to the other two partners jointly with themselves; *secondly*, that it was sufficient for them to shew that they had an equitable interest to entitle them to freight; for though the stat. 19 G. II. c. 37. required that the insured should have some interest in the thing insured; yet, whether that were a legal or an equitable interest, or even a reasonable expectation of interest, it was still insurable.—But the court clearly held that the *four* partners had not any insurable interest in the freight, and a nonsuit was accordingly entered.—Lord *Kenyon* said—"I studiously avoid discussing the question whether or not a party may insure a *hope or expectation*, not having any interest in the subject insured: It will be time enough to examine that case when it arises. But on the present question I cannot entertain a doubt; for the right to freight results from the right of ownership; and if the plaintiffs have no title to the ship, they have no interest in the freight. It is like the case of an action for use and occupation: If one person permit another to enjoy his estate, it is not competent to the latter to dispute the title of the former.—But if the former bring an action against a third person, which depends on his own title, he cannot succeed, unless he shew a title. So, if the plaintiffs had let out the ship to other

Freight can only be due to the legal owner of the ship, and he only can insure it.

(*a*) By stat. 26 G. III. c. 60. s. 17, (Lord *Hawkesbury's* Act) 'When and so often as the property in any ship or vessel shall 'be transferred to any other or others, in whole or in part, the 'certificate of the registry of such ship or vessel shall be truly 'and accurately recited in words at length, in the bill or other 'instrument of sale thereof, otherwise such bill of sale shall be 'utterly null and void to all intents and purposes.'

persons,

persons, perhaps those persons would not have been suffered to contest the plaintiffs title: But here, the plaintiffs claim the freight in right of ownership: They had no right to insure the freight, unless they can shew a right to the ship: It is not pretended that they had any legal title to the ship; and according to the decision of *Hibbert* v. *Rolleston* (*a*), they had no equitable title. It was there held, that the register act was equally binding in a court of equity, as in a court of law, and the court refused to compel the vendor to make a legal conveyance to the purchaser, who claimed under a defective bill of sale. And, indeed, if an equitable interest could prevail in contradistinction to a legal interest, it would repeal the wise provisions of that act, which has proved highly beneficial to the commercial interests of the country." (*b*)

And no person can have either a legal or equitable title to a ship, unless he be named in the register.

The lender upon bottomry and respondentia has an insurable interest for the sums lent.

Though respondentia and bottomry loans are themselves a species of insurance, yet the lender has an insurable interest in his securities, and therefore may protect himself from the *sea-risk* by insuring them. If I lend, *J. S.* 1000l. on bottomry at 12 *per cent.* for a given voyage, and the ship arrive safe, he must pay me the sum lent with the stipulated interest. If the ship be lost, *J. S.* is discharged from the debt. My capital is therefore put in risk; and there can be no reason why I should not insure it; and this insurance is in nature of a re-insurance.

In several parts of *Italy* it is permitted to lend money on bottomry and respondentia, where the borrower has nothing on board. It is singular, however, that in such case, if the lender insure his capital, and the ship be lost, the insurer is not answerable, unless the insurance were made in the *form* of a wager. At *Genoa*, even in that form such insurance is prohibited (*c*).—In *Italy* the lender may insure, not only his principal, but also the marine interest. But upon the interest, the insurance is considered as a wager. Even the honesty of the borrower may be insured (*d*).—In *France* the borrower is pro-

(*a*) 3 T. R. 406.——(*b*) Vid. *Marsh* v. *Robinson*, 4 *Esp.* N. P. Rep. 98, inf. ch. 16, s. 5, *n.* 4.——(*c*) *Casaregis*, disc. 14. *n.* 21. ——(*d*) *Casaregis*, disc. 1. n. 123, 124.

hibited from insuring the sum borrowed; and the lender, though he may insure his capital, must not insure the interest (*a*). The lender can insure only the amount of the sum lent, and the borrower has an insurable interest in the ship or goods to the amount of the surplus value above the sum lent (*b*). If either were to insure more, it would be a gaming insurance, and void by the stat. 19 *G.* II c. 37, for all above the real interest.

The owner of the ship or goods has only an insurable interest in the surplus value above the sum lent.

Yet where the usage of a particular trade has sanctioned a departure from this rule, an insurance made in conformity to such usage will be good.—As where an insurance was made on behalf of the captain of an *East indiaman*, on "*goods, specie, and effects*" on board his ship.—In an action on the policy, the plaintiff claimed to recover, under that insurance, money which he had expended in the course of the voyage for the use of the ship, and for which he charged respondentia interest.—On the trial it appeared, that this kind of interest was always insured under the denomination of *goods, specie, and effects*. The court determined, that under the usage the plaintiff might recover.—Lord *Mansfield*, after delivering his opinion upon another point which arose in the case, said; "As to the question, whether the words, "*goods, specie, and effects*," comprehend this interest, I should think not, if we were to consider only the *words* made use of. But here there is an *express usage* which must govern our decision."

Gregory v. *Christie*, B R T. 24 G III. *Park* 11, inf. ch. 7. f. 5.

But the usage of trade may take a case out of this rule. Upon an insurance on goods, specie and effects in the *India* trade, the insured may recover for money laid out for the use of the ship, and for which he charged respondentia interest; it being the usage of the trade to insure in this form.

It is plain that a policy on bottomry or respondentia cannot be subscribed by the borrower of the money; because it is only in consideration of the sea risk, from which he is exempt, that he agrees to pay the marine interest. If he were to become an insurer, this would be no longer a loan upon bottomry, but a cloak for usury.

The borrower cannot underwrite a policy on bottomry.

(*a*) Ord of *Louis*, 14. h. t. art. 16. 17. *Pothier*, h. t. 32, 44. *Emerig.* tom. 1. p. 236, 237. — (*b*) Vid. 19. *G.* II c. 37. f. 5, and Lord *Mansfield's* exposition of it in *Glover* v. *Black*, 3 *Bur.* 1394. 1 *Bl.* 399, 405, 422. inf. c. 8. f. 3.

Sect. II.

Of Wager Policies.

MANY are the contrivances which men have fallen upon for the gratification of their propensity to gaming: And the uncertain events of maritime adventure afford an obvious and extensive field for the calculation of chances, and the decision of fortune. *Gaming.*

The practice of gaming, by nourishing a constant hope of gain, excites in the mind an interest which engrosses the attention, and withdraws the exertions of men from useful pursuits. By pointing out a speedy, though hazardous mode of accumulating wealth, it produces a contempt for the moderate, but certain, profits of sober industry. It perverts the activity of the mind, taints the heart, and depraves the affections: And, by frequent and great reverses of fortune, it becomes not only the source of great private misery, but suggests constant temptations to fraud and the perpetration of the most atrocious crimes. —There are few well regulated governments, therefore, in which gaming has not been laid under considerable restrictions. In this country ideas less rigid have prevailed. Innocent wagers have long had the sanction of the common law (*a*). They are only deemed illegal where they are prohibited by statute (*b*); where they tend to create an improper influence on the mind, in the exercise of a public duty (*c*); where they are *contra bonos mores*, or in any other manner tend to the prejudice of the public, or the injury of third persons (*d*). And yet, after all, it must

Legality of wagers in England.

(*a*) 11 *Rep.* 876, 1 *Lev.* 33. 5 *Bur.* 2802.——(*b*) *R. Ximenes* v. *Jaques*, 6 T. R. 499.——(*c*) *R. Allen* v. *Hearn*, 1 T. R. 56.——(*d*) *R. Atherfold* v. *Beard*, 2 T. R. 610. *R. Da Costa* v. *Jones*, *Cowp.* 729. *Roebuck* v. *Hammerton*, *Cowp.* 737: and yet, in the case of *Jones* v. *Randal*, *Cowp.* 37, the Court determined that an action might be maintained on a wager, 'whether a decree of the 'court of Chancery would be reversed or not in the House of 'Lords.'—It is not easy to reconcile it with any just idea of public

must be owned that the law greatly descends from its dignity, when it lends its aid to give effect to any wager, however innocent.

We

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public policy, that a wager upon the event of a decision in the supreme court of justice, should have met with so much countenance. In the case of *Atherfold* v. *Beard*, above referred to, Mr. Justice *Ashurst* says that, 'in his opinion, the courts had 'gone far enough in encouraging wagers, and that it would, 'perhaps, have been better for the public if the courts had 'originally determined that no action could be maintained to 'enforce the payment of a wager.' Mr. Justice *Buller*, in the same case, seemed to doubt the legality of any wager between persons not interested in the subject matter: and said that the stat. 14 *G.* III. c. 48, extended to all wagers, though it speaks only of *policies*; 'for,' says he, 'either the courts must restrain 'that act to such cases as *in form* are policies, which would entirely repeal it; or, by pursuing the spirit of *it*, extend it to 'all cases. I think the latter is the true construction; for a 'policy is nothing but a promise. And it would be strange to 'determine that the party might do the same thing in one form, 'which the statute has expressly prohibited to be done in another.'—In the case of *Good* v. *Elliott*, 3 T. R. 693. Mr. Justice *Buller* had an opportunity of maintaining the opinion which he had thus thrown out.—The question was, *first*, whether a wager that *A.* had purchased a waggon of *B.* was void at common law, as being a *gaming contract*; and *secondly*, whether it was void by the above stat. 14 *G.* III. The learned judge maintained the affirmative on both these points. But the rest of the judges of the court of King's Bench, namely Lord *Kenyon*, Mr. Justice *Ashhurst* and Mr. Justice *Grose*, were clearly of a contrary opinion, upon both points. They held that, however it might be wished that no wagers were permitted, the question, whether an action would lie on *any* wager, had been settled by so many authorities, both ancient and modern, that no doubt could now be entertained upon it. And as to the second point, whether the wager was void by the stat. 14 *G.* III., they held that that act related wholly to *policies of insurance*, and that it would be distorting the meaning of the words, to suppose that such a wager as the above could have been within the meaning of the legislature.—In the case of *Roebuck* v. *Hammerton*, *Cowp* 737. it was holden that a policy made upon the sex of the chevalier *D'Eon* was within the prohibition of this stat. 14 *G.* III. c. 48.

And

We have already observed (*a*), that an insurance, being a contract of *indemnity*, its object is, not to make a *positive gain*, but to avert a *possible loss*; and that, as a man can never be said to be *indemnified* against a loss which can never happen to him, a policy without interest is no insurance, but only a mere wager. It is *spei emptio*, and not *aversio periculi*, which is the true idea of an insurance. A policy, therefore, made without interest, is properly denominated a wager policy, and has nothing in common with insurance but the name and form.

Difference between a wager and an insurance.

It is usually conceived in the terms, '*interest or no interest*,' or, '*without further proof of interest than the policy*;' to preclude all enquiry into the interest of the insured. And, as a consequence of the insured's having no interest in the pretended subject of the policy, it follows that the insurer cannot be liable for any partial loss. A partial loss is not an event sufficiently defined and precise to be the criterion of a wager; and nothing but that sort of misfortune which is considered as amounting to a total loss can decide it. The parties mean to play for the whole stake; and when the underwriter pays a loss, he cannot, as in the case of an insurance upon interest, claim any benefit from what may have been saved; and to preclude all claim of that sort, the words, '*free of average, and without benefit of salvage*,' are always introduced into wager policies.

Form of a wager policy.

These gaming contracts were formerly in use in *France*, and they are still tolerated in *Portugal* and some parts of *Italy*. In *France* the mischiefs resulting from them were soon discovered; and they were prohibited in the year

Wager policies prohibited in most commercial states.

And in *Mollison* v. *Staples*, at G. H. *Mich.* Vac. 1778, Lord *Mansfield* held that a policy made on the event of there being an open trade between *Great Britain* and *Maryland* on or before the 6th of *July* 1778, was void; 1st, because the insured had no interest within the meaning of the act, which was made to prevent gambling policies; and though every man has an interest in the events of war and peace, this was not an interest within the act; 2dly. because the name of the party interested was not inserted in the policy according to the 2d. section of the act. —— (*a*) Sup. 104.

1681 by the ordinance of the marine (*a*), which seems to have been, in this respect, scrupulously enforced. And so general, indeed, is the aversion from all insurances not founded upon a real and vested interest in the thing insured, that not only wagers, in the form of insurances, but even insurances upon expected profit, freight not earned, seamen's wages, &c. are prohibited by the ordinances of most of the commercial states of *Europe* (*b*).

Whether legal in *England*.

If the question, whether a wager policy be a legal contract at common law, were now *res integra*, I think it would be extremely difficult to maintain the affirmative. As a *wager*, I need only refer the reader to the preamble to the stat. 19 *G*. II. c. 37 (*c*), to shew that it is pregnant with as much mischief, both public and private, as can proceed from any species of gaming which the legislature has hitherto found it necessary to repress. And yet, within the space of little more than a century, it has crept into use in this country, and has at length obtained the sanction of the courts of *Westminster*. It will not be uninteresting to trace, as far as we are enabled by authorities, the steps by which this mischievous species of gaming came to find so much favour in the eyes of the law.

At what time introduced there.

At what time these wager policies first came into use in this country is not quite certain; but it was probably since the revolution. The clause "*interest or no interest*," does not necessarily make the policy a wager (*d*). This

(*a*) *Defendons de faire assurer ou réassurer des effets au dela de leur valeur, par une ou plusieurs polices, à peine de nullité de l'assurance, et de confiscation des marchandises.—Si toutefois il se trouve une police faite sans fraude, qui excéde la valeur des effets chargés, elle subsistera jusqu'à concurrence de leur estimation; et en cas de perte, les assureurs seront tenus chacun à proportion des sommes par eux assurées comme aussi de rendre la prime du surplus à la reserve du demi pour cent.* Ord. de la Mar, h. t. art 22, 23. Vid. *Valin* on articles 22, 23 h. t. p. 71, 72.——(*b*) Vid. Ord. of *Amsterdam*, *Rotterdam*, *Conningsberg*, *Genoa*, *Stockholm*, &c. as collected by *Magens*.——(*c*) Inf. 127.——(*d*) Vid. sup. 102.

clause

clause was at first countenanced in the supposition that it only amounted to an admission of the interest of the insured, and could have no other effect than to save him the trouble and expence of proving his interest in case of litigation (*a*).

In the case of *Martin* v. *Sitwell*, which came before the court of King's Bench in the year 1691, it was admitted that where goods are insured, but it appears that the insured had none on board; the policy, by the custom of merchants, is void, and the insurer bound to return the premium.

Martin v. *Sitwell*, 1 *Show.* 156.

The first case I can find where the validity of an insurance without interest came directly in question in *Westminster Hall*, was in the year 1692.—A bill was filed in the Court of Chancery to have a policy delivered up to be cancelled, upon the ground that the insured had no interest either in the ship or cargo.—The insured had lent 300*l.* on bottomry on the ship; and, without any other interest, insured 450*l.* upon her. The ship survived the time limited in the bottomry bond; but was lost within the time limited by the policy; and the insured claimed, not only the money due on the bond, but also the sum insured by the policy.—The court (*b*) decreed the policy to be delivered up to be cancelled, and said,—"Take it, that the law is settled, that if a man has no interest and insures, the insurance is void, although it be expressed in the policy, *interested or not interested.* And the reason the law goes upon is, that insurances are made for the encouragement of trade, and not that persons unconcerned in trade, nor interested in the ship, should profit by them. The reason why the law allows, that a man having some interest in a ship or cargo, may insure more, or five times as much, is, that a merchant cannot tell how much, or how little, his factor may have in readiness to lade on board his ship."

Gollart v. *Garrett*, 2 *Vern.* 269

In 1692, a policy was decreed to be delivered up to be cancelled, because the insured had no interest.

(*a*) Per Cur. in *De Paiba* v. *Ludlow*, 1 *Com. Rep.* 361.——(*b*) The commissioners of the great seal, at that time were, Sir *John Trevor*, Mr. Serjeant *Hutchins*, and Mr. Serjeant *Rawlinson*.

In

Assievedo v. Cambridge, 10 Mod. 77.

In 1710, a wager policy was admitted in B R to be a legal contract.

In the course of twenty years from this time, this doctrine seems to have given place to a contrary sentiment; for, in 1710, a case came before the court of King's Bench, upon a special verdict, where the question was, whether the insured upon a policy without interest, was entitled to recover as for a total loss, where the ship, having been captured, was re-captured before she was carried *infra præsidia hostium.*—The case was argued by civilians; but it was only contended on the part of the defendant, that the insured, in a *wager policy*, ought not to recover in a case where he could not have recovered on a policy *upon interest.* It was never objected that the policy was void for want of interest; so that the legality of wager policies seems not to have been at that time doubted. On the contrary, Doctor *Floyer*, in arguing for the plaintiff, insisted that, as the policy was a wager, the question whether the capture divested the property out of the owners, did not arise between the plaintiff and defendant, the only question between them being merely, whether the ship was in fact taken.

Le Pypre v. Farr, 2 Vern. 716.

In 1716, it was holden that the value in the policy should be the true value of the effects insured.

A few years afterwards, (*Mich.* 1716), upon a bill for a discovery filed in the court of Chancery by the underwriters against the insured, upon a valued policy; the Lord Chancellor ordered the defendant to discover what goods he had put on board: For though he offered to renounce all interest to the insurers, yet it was referred to a master to examine the value of the goods saved, and to deduct it out of the 600*l.* at which the goods were valued by the agreement.

Not much can be gathered from the imperfect report of this case, except that, in the case of a valued policy, the insured was considered as bound, if called upon, to shew that goods to the amount of the value in the policy were in fact put on board; from which it may be inferred that the court of Chancery, at least, still deemed the policy valid only to the extent of the interest of the insured.

Harman v. Van Hatten, 2 Vern. 717.

In the same year it was determined that the lender on bot-

And yet, in the same term, a case, not unlike that of *Goddart* v. *Garrett* (a), came before the same court, in which

(a) Sup. 123.

tomry might have the benefit, not only of the bond, but of a policy on the ship also.

which the opinion of the Lord Chancellor seems to have proceeded on quite a contrary principle. There it appeared that the defendant had lent the plaintiff 250*l.* on bottomry, and afterwards insured the ship for the same sum, but for a greater voyage than that which was mentioned in the bottomry bond. The ship being lost, the defendant recovered the money on the policy, and also put the bottomry bond in suit, the ship having, before she was lost, deviated from the voyage mentioned in the bond.—The plaintiff brought his bill, insisting that, as the defendant had no interest in the ship, but in respect of the money lent on bottomry, he ought not to have the fruit both of the bond and the policy, and praying to have the benefit of the insurance, on paying the premium.—But the Lord Chancellor held that the defendant, having paid the premium, was entitled to the benefit of the policy, as well as of the bond.

The decision of this case is quite at variance with that of *Goddart* v. *Garrett*, and shews that a new doctrine, founded on a new principle, had introduced itself into the court of Chancery since the year 1692.

De Paiba v. *Ludlow*, 1 *Com. Rep.* 361.

In 1721, it was determined that an insurance, interest or no interest, was good.

In the year 1721, a case nearly similar to that of *Assievedo* v. *Cambridge* (*a*), came before the court of Common Pleas.—A ship, insured *interest or no interest*, was captured by a pirate, and after nine days retaken and brought into an *English* port.—The court determined that the defendant was liable. For though it was objected that the insurer was only responsible where the plaintiff had a property, and that the term of insuring, interest or no interest, was introduced since the revolution; yet it was said that such an insurance was good, and the import of it was, that, as the defendant could not controvert the interest, the plaintiff had no occasion to prove it (*b*).—From this last declaration it would seem that though the judges were not, at that time, inclined to

(*a*) Sup. 124.——(*b*) It would seem rather to have been a contrivance to deceive the insurers and evade the law. Taken in that light it was void; for *non valet conventio ne dolus præstetur.*

discountenance

discountenance insurances in this form, they were not quite willing to admit them to be mere wagers.

Dean v. Dicker, 2 Str. 1250. inf. c. 12. f. 3.

In 1746, a wager policy was holden to be good.

At length, in 1746, a case came before Lord C. J. *Lee* at *nisi prius*, upon a policy without interest, on goods.—The ship was taken and carried into an enemy's port, from whence she was cut out by an *English* ship eight days after.—The plaintiff insisted that this policy, though on goods, was a wager on the bottom of the ship, and that he was therefore entitled to recover as for a total loss. The defendant insisted that, as the ship and cargo were to be restored on paying salvage, this was only an average loss, and the plaintiff could only recover in the case of a total one.—But the Chief Justice held that the plaintiff ought to recover; for his was a wager upon a total loss *in the voyage*, and there had happened one by the capture and detention for eight days.

These are all the early cases I have been able to find on this question. From the first of them it appears that, even since the revolution, it was determined that an insurance without interest was void. Afterwards it would seem that policies, *interest or no interest*, which were at first, perhaps, insurances upon real interest, became in time only a cloak for mere gaming contracts, were at length openly avowed, and became frequent subjects of litigation in the courts of *Westminster*.

More modern decisions.

In more modern times, our most eminent judges have recognized them as legal contracts.—Lord *Mansfield*, in delivering the opinion of the court in the case of *Goss* v. *Withers* (a), distinguishes between wager policies and policies upon real interest, in order to shew that, in an action upon the former, the plaintiff could only recover in the case of a total loss; but that, upon the latter, the insured might recover the loss really sustained, whether total or partial.—In the case of *Cranford* v. *Hunter* (b), Lord *Kenyon*, and the rest of the judges of the court of King's Bench were unanimously of opinion that, at common law, before the stat. 19 *G*. II. c. 37., a person might have insured without having any interest in the thing insured.

(a) 2 *Bur*. 693. inf. c. 13. f. 1.—(b) 8 *T. R*. 23. sup 109.

Certain

Certain it is that this species of gaming having thus obtained the sanction of the law, became, about the year 1746, so prevalent, and the evils resulting from it so injurious to the best interests of this country, that the legislature found it necessary to interpose, and by the stat. 19 *G.* II. c. 37. has imposed some wholesome restraints upon it.

The preamble recites that, 'Whereas it hath been 'found by experience that the making of insurances, in- 'terest or no interest, or without further proof of in- 'terest than the policy, hath been productive of many 'pernicious practices, whereby great numbers of ships, 'with their cargoes, have either been fraudulently lost 'and destroyed, or taken by the enemy in time of war; 'and such insurances have encouraged the exportation of 'wool and the carrying on of many other prohibited and 'clandestine trades, which, by means of such insurances, 'have been concealed, and the parties concerned secured 'from loss, as well to the diminution of the public 'revenue, as to the great detriment of fair traders; and 'by introducing a mischievous kind of gaming, under 'pretence of insuring against the risk on shipping and 'fair trade, the institution and laudable design of making 'insurances hath been perverted; and that which was 'intended for the encouragement of trade and naviga- 'tion hath, in many instances, become hurtful of, and 'destructive to, the same.'—The statute therefore enacts (§ 1.), 'That no insurance shall be made on any ship or 'ships belonging to his Majesty, or any of his subjects, 'or any goods or effects laden on board such ships, *inte- 'rest or no interest*, or, *without further proof of interest than 'the policy*, or, *by way of gaming or wagering*, or, *without 'benefit of salvage to the insurer*, and that every such in- 'surance shall be void.'

At length prohibited by stat. 19 *G. II.* c. 37.

By s. 1. No insurance shall be made on the ships or goods of his Majesty, or any of his subjects, interest or no interest, &c.

But, by § 2. 'It is provided, That insurances on pri- 'vate ships of war, fitted out by any of his Majesty's 'subjects, solely to cruise against his enemies, may be 'made by or for the owners thereof, interest or no inte- 'rest, free of average, and without benefit of salvage to 'the insurer.'

§ 2. Except on privateers.

And

§ 3. And except as to effects imported from the dominions of *Spain* and *Portugal*.

And by § 3. it is also provided, 'That any effects 'from any port or places in *Europe* or *America*, in the 'possession of the crowns of *Spain* or *Portugal*, may be 'insured in the same manner as if this act had not been 'made (*a*).'

§ 5. Money lent on bottomry or respondentia, in the *East India* trade, shall be lent only on the ship or goods, and insured only by the lender. The borrower shall not recover on any insurance more than the value of his interest, exclusive of the money borrowed. If this do not amount to the sum borrowed, he shall be responsible for the deficiency, though the ship be lost.

By sect. 5. 'All sums of money lent on bottomry or 'respondentia, upon ships belonging to his Majesty's 'subjects, bound to or from the *East Indies*, shall be lent 'only on the ship, or on the merchandize or effects on 'board, or to be laden on board, and shall be so ex'pressed in the condition of the bond; and the benefit 'of salvage shall be allowed to the lender, his agents or 'assigns, who alone shall have a right to make insurance 'on the money so lent; and the borrower shall recover 'no more on any insurance than the value of his interest 'in the ship, or in the goods on board, exclusive of the 'money so borrowed: And in case it shall appear that 'the value of his share in the ship, or in the goods on 'board, doth not amount to the sum borrowed, he shall

(*a*) The reason of this exception is not very obvious. That assigned for it is, that *Spain* and *Portugal* have each prohibited all trade between the subjects of foreign states and their respective colonies in *America*. *Park* 274. But it does not follow from thence that *British* subjects might not import goods from *Spain* and *Portugal*. Certain it is that a great trade is generally carried on with both those countries by *British* subjects in their own names.—The true reason for this exception seems to be, that persons carying on a contraband trade with those countries, might insure their goods without disclosing the particular commodities of which they consisted; which, without this exception, they must have done, in order to prove an interest. *Emerigon* (vol. i. p. 212.) says, that the reason of this exception in the *English* statute is sufficiently obvious; namely, that the *English*, who practise smuggling in those countries, can obtain no bills of lading, or other evidence of their cargoes. He admits, however, that the same practice is permitted in *France*, not *by law*, but by an *evasion of the law*. Lord *Mansfield* is stated by Mr. Justice *Buller* to have given nearly the same reason for this exception. Vid. 2 *T. R.* 163.—Vid. *Thellusson* v. *Fletcher*, inf. ch. 13. s. 3.

'be responsible to the lender for so much of the money 'borrowed as he hath not laid out in the ship or goods on 'board, with interest for the same, together with the 'insurance and all other charges thereon, in the pro-'portion which the money not laid out shall bear to the 'whole money lent, notwithstanding the ship and goods 'be totally lost.'

The plaintiff in any action on a policy, shall, in 15 days after request, declare how much he has insured, and borrowed on bottomry.

And, by sect. 6. 'In all actions brought by the in-'sured, the plaintiff, or his attorney or agent, shall, 'within fifteen days after he shall be required so to do 'in writing by the defendant or his attorney or agent, 'declare in writing what sum or sums he hath insured, 'or caused to be insured in the whole, and what sums 'he hath borrowed at respondentia or bottomry, for the 'voyage or any part of the voyage in question (*a*).'

[illegible]he restr[illegible] of [illegible] act not ex[illegible]d foreign sh[illegible] goods on boa[illegible]

The regulations and restrictions of this statute, being confined to insurances on ships belonging to his Majesty and his subjects, and to goods or effects laden thereon, Insurances upon the ships and goods of foreigners are not within the act, but remain upon the same footing as before the passing of it, as appears by the following case.

Th[illegible]v. F[illegible]cher, [illegible]

[illegible] *fo*[illegible] the [illegible] [illegible] proof of interest [illegible] [illegible] the [illegible] evidence of interest.

An insurance was made on goods on board three *French* ships, 'from *St. Domingo* to *Bourdeaux*, all or 'any of them; the goods by agreement to be valued at 'a certain sum; the policy to be deemed *sufficient proof* '*of interest* in case of loss.'—The declaration averred that goods, to the amount of the sum insured, were shipped on board the three ships, *some or one of them*, and that two of them had been captured, and the other lost. —After judgment by default, and a writ of of inquiry executed, the defendant moved to set aside the inquisition, on the ground that damages had been assessed to the full amount of the defendant's subscription, without any

(*a*) The stat. 14 *G*. III. c. 48. was made to restrain insu-rances upon lives, *or other events*, beyond the *interest* of the insured; but, by an express proviso in the 4th section, it is declared that it shall not extend to marine insurances. Vid. inf. B. 3. ch. 3.

proof of the value, or any other evidence, except the defendant's hand-writing to the policy; and that, in fact, the insured had no interest.—The court held, that this policy was not within the statute, foreign ships not being included in it, on account of the difficulty of bringing witnesses from abroad to prove the interest; and that, by suffering judgment to go by default, the defendant had confessed the plaintiff's title to recover; and the amount was fixed by the stipulation in the policy.

An insurance cannot be made on *goods*, to depend on the fate of the *ship*.

An insurance cannot be made upon one thing, to depend on the fate of another. If the subject matter of an insurance be unconnected with the event insured against, the policy, if not altogether nugatory, is at least a wager. As if a cargo be insured, and money be expended in reclaiming it upon the ship being captured, and this money be, by the court of Admiralty, made a charge upon the cargo: This cargo cannot be insured upon the event of the *ship's* arrival at her port of destination; for this, as to the ship, is a mere wager; and as to the cargo, the underwriters are not liable to any peril to which it is exposed.

Kulen Kemp v. Vigne, 1 T. R. 304.

Money is expended in reclaiming a cargo on board a captured ship, which is made a charge upon the cargo. This money is insured upon the cargo, upon the event of the *ship's* arrival at her port of destination. The ship being [illegible] captured and [illegible] The [illegible] insured, and is afterwards lost. —The policy being on the *goods*, and the insurance being [illegible] the *ship's* arrival, is a wager, and void.

Thus:—Goods were insured on board the *Emanuel*, 'at and from *Falmouth* to *Marseilles*, warranted a *Danish* ship.'—On the policy was this memorandum:—'The following insurance is declared to be on money 'expended for reclaiming the ship and cargo, valued at 'the sum which shall be declared hereafter. The loss 'to be paid in case the ship does not arrive at *Marseilles*, 'and without farther proof of interest than this policy; 'warranted free from average, and without benefit of 'salvage.'—The insured were proprietors of the *cargo*, but not of the *ship*. The ship had sailed originally with the cargo from *Riga* on a voyage to *Marseilles*, was captured by an *English* privateer, and condemned.—The sentence of condemnation was afterwards reversed, the prize being proved to be a *neutral ship*; but the expences were ordered by the Admiralty to be a charge upon the cargo. The plaintiff's agents paid these expences amounting to 1031*l.* 14*s.*, and immediately procured the above insurance to be effected. In *February* 1781, the ship sailed

ſailed from *Falmouth*, with the original cargo on board, in the proſecution of her voyage to *Marſailles*, but was captured by a *Spaniſh* ſhip, and carried into *Ceuta*, where ſhe was again condemned. An appeal was brought, and the cargo, being of a periſhable nature, was ordered to be ſold, and the proceeds brought into court, to wait the event of the ſuit. In *May* 1783 the ſhip was reſtored by ſentence of the court of appeal. After deducting the expence of proſecutiug the appeal in *Spain*, the ſurplus, amounting to no more than twenty-ſix rix dollars, was paid to the owners. As ſoon as the ſhip was liberated, ſhe ſailed from *Ceuta* to *Malaga* to refit, and having there made the neceſſary repairs, ſhe ſailed for *Bremen*, and in that voyage was loſt.—The cargo had been inſured at *Bremen*, for the original voyage from *Riga* to *Marſeilles*, and the amount of that inſurance was paid.—In an action on the above policy, the loſs was averred to be by *capture*. On the trial, it was objected, not only that the plaintiffs could not recover, as for a loſs by *capture* (*a*), but alſo that this was not an *inſurable intereſt*; for if the inſurers at *Bremen* were anſwerable for the expences that had been incurred in reclaiming the goods, the preſent contract would amount to a *double inſurance*, and would be conſequently void.—The plaintiffs were nonſuited upon theſe objections; and upon a motion to ſet aſide the nonſuit, the court held both objections to be well founded.—Lord *Mansfield* ſaid,—"The intereſt on which the plaintiffs effected this policy, was money laid out in reclaiming the *cargo*. The event inſured was the arrival of the *ſhip* at *Marſeilles*. A loſs accrued upon the *cargo*, the underwriter is ſued, and this loſs is averred to be by *capture*. The ſhip was taken by the *Spaniards*, but afterwards reſtored, and in a condition to purſue her voyage, but was loſt *in another voyage*.—This is a wager policy, and juſt the ſame as if the event inſured had been the arrival of any other ſhip at *Marſeilles*. The plaintiffs were intereſted in the *cargo alone*; but the event inſured is the arrival of the *ſhip*, and not of the cargo. There

(*a*) As to this point vid. *inf*. c. 16. ſ. 2.

was only a temporary capture, and though this, by construction, is such a loss, as that an insured *upon interest* is warranted in abandoning at the time, if he please; yet we must consider what the truth of the case was between those parties. Now this was a wager policy, and in such a case, there can be no abandonment. But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to pursue the voyage to *Marseilles*, which they might have done. Nor is it any excuse that they could no longer control her destination; for in wager policies the insured take upon themselves to perform all that the owners could have done in the same situation." —Mr. Justice *Buller* said,—"The parties who were interested in the cargo *alone*, insured the *ship*, with which they had no concern. The goods might have arrived safe, and the ship have been lost, and then they would have been entitled to recover as for a total loss; though they had sustained no damage. On the other hand, if the ship had arrived, and the goods had been lost, they could have recovered nothing, though they would have really sustained a damage. The policy, therefore, is not adapted to the real truth of the case, but is a wager policy, and that alone is decisive upon the ground of merits (*a*).

In wager policies the insured takes upon himself to perform all that the owner could have done.

The exception in the third section of the act, relating to effects imported from the dominions of *Spain* and *Portugal*, enables the insured upon that trade, though carried on in *British* ships, to recover without the proof of any interest.—Therefore where an insurance was made, 'Upon any of the packet boats that should sail from '*Lisbon* to *Falmouth*, for one year, upon any kinds of 'goods or merchandize whatsoever; and it was agreed 'that the goods *should be valued at the sum insured on such* '*packet boat*, *without further proof of interest than the*

Da Costa v. *Frith*, 4 *Bur.* 1966, *infra* c. 13. s. 4.

A policy "*without further proof of interest than the policy*," on goods from *Lisbon*, is good, within the 3d section of the act.

(*a*) It seems extraordinary that, if this was taken to be a wager policy on the ship, the counsel for the plaintiff did not avail themselves of her being a *foreign ship*, to shew that a policy without interest upon her was not within the stat. 19 G. II. c. 37.

'*policy*; and to make no return of premium for want of 'interest, being on bullion or goods.' The insured had an interest in bullion on board one of the *Lisbon* packets, which was totally lost within the time mentioned in the policy.—The court held, that this was a policy of a peculiar sort, and good within the exception of the stat. 19 *G*. II. c. 37. s. 3 (*a*). That it was a mixed policy, partly a wager policy, and partly an open one; and being a valued policy, and fairly so, without fraud or misrepresentation, and the loss having happened, the insured was entitled to recover as for a total loss.

A small interest will not take a case out of the statute.

Though the insured has an interest in the thing insured, yet if it be small in comparison of the sum insured, the object of the contract will be considered, not as an indemnity, but as a wager; and its being made in the form of a special agreement, will not take it out of the statute.

Kent v. *Bird*, *Cowp*. 583.

An agreement, in consideration of 20*l*. to pay 1000*l*., if a ship did not save her passage to *China*, is a wager within the act, though the party have *some* goods on board.

Thus, where an action was brought by the surgeon of an *East Indiaman*, against a passenger, upon a special agreement, 'that, in consideration that the plaintiff 'had agreed to pay the defendant 20*l*. at the next port the 'ship should arrive at, the defendant undertook that the 'ship should save her passage to *China* that season; and 'in case she did not, he would pay the plaintiff 1000*l*. 'at the end of one month after the ship's arrival in the '*Thames*.'—The defendant paid the 20*l*. into court.—At the trial it appeared, that the plaintiff had paid the defendant the 20*l*. at the next port; that the ship, being delayed below *Madras*, in consequence of a miscalculation of five days in the reckoning, and the monsoons setting in earlier than usual, she lost her passage; that the plaintiff had *some goods* on board, which were liable to suffer by the loss of the season; that while the matter remained doubtful, the plaintiff, by the desire of the captain, would have cancelled the agreement, but the defendant positively refused.—The jury found a verdict for the plaintiff, damages 980*l*.—Upon a motion for a new trial, it was contended, on the part of the de-

(*a*) Sup. 128.

fendant, that this was a wager insurance within the stat. 19 G. II. c. 37., and of this opinion were the court.— Lord *Mansfield* said,—"The statute, under general words, prohibits all contracts of insurance by way of *gaming* or *wagering*.—Here the plaintiff gave so much to the defendant, in consideration that if the ship should not save her passage to *China*, he was to receive 1000*l.* on her safe return to *England*.—This was clearly *wagering*; and, if it were allowed, all wager policies would be turned into this form, and the act be entirely defeated."

How a valued policy is distinguishable from a wager.

Though a valued policy, when fairly made, is distinguishable from a wager in this, that the former is founded on real interest, the amount of which is agreed by the policy; in the latter, the insured has avowedly no interest at all: Yet, it must be owned that a valued policy often partakes of the nature both of a policy on interest and of a wager; for though it supposes a *bona fide* interest in the insured, this interest is not always expected to be exactly commensurate with the amount of the insurer's obligation. There is a real interest, it is true, but this, in many instances, falls far short of the nominal value in the policy; and it too often happens that, under colour of a small interest, and in the form of a valued policy, many insurances which are, in truth, mere wagers, are effected, and the beneficial purposes of the stat. 19 G. II. c. 37. thereby evaded.

How this is regulated by the *French* law.

By the law of *France*, the value in the policy is taken to be true, as against the insurer, till he prove the contrary (*a*). *Valin*, indeed, says that an insurer cannot be permitted to alledge fraud in the value specified in the policy, so as to be let in to shew a new valuation, without shewing that the value in the policy is at least *one fourth too high* (*b*). *Pothier*, on the contrary, holds that the value is only to be taken as just, till impeached by the insurer; who may be let in to prove the valuation to be

(*a*) *Valin* h. t. art 64. p. 136. *Pothier*, h. t. n. 151. 159. *Emerig* tom. 1. p. 271, 2.——(*b*) *Valin* sur art. 64. h. t. *Le Guidon*, ch. 2. art. 13.

too high, even where there is an expreſs clauſe in the policy to preclude ſuch inquiry; ſuch clauſes being always held to be illegal (*a*), the rule of the civil law being, *Conventio ne dolus præſtetur, rata non eſt* (*b*).—If the exception to the valuation prevail, it either reduces the ſum inſured to the value of the goods, or, if fraud appear in the valuation, avoids the policy, and bars the demand of the inſured: That is, if the inſured *knew* that the goods were over-valued; or even where there is a *preſumption* of fraud, ariſing from the concealment of a former inſurance, the policy would be void (*c*). For by the ordinance of the marine (*d*), the inſurance ſhall be preſumed fraudulent, if the inſured do not declare all he has inſured; or even if he demand payment beyond the value of the effects inſured. For the moment the inſured would turn a loſs to his own advantage, and ſeek to recover more than he put in riſk, with whatever good faith he might have made the original valuation, he is guilty of fraud (*e*). But however the exceſs may have originated, it is incumbent on him to ſhew that it proceeded from ſome error on his part, or on the part of his agents. *Pothier* and *Valin* ſay, however, that when the tranſaction admits of doubt, the judges, to mitigate the ſeverity of the law, are more inclined to impute the fault to error than to fraud; and therefore, unleſs fraud be made evident, a juſtification is readily received (*f*).

The effect of the valuation, before wager policies were held legal.

In *England*, before wager inſurances obtained the ſanction of the courts of law, the value inſerted in a policy was not conſidered as concluſive: For though it is ſaid in *Goddart* v. *Garrett* (*g*), that the law allows a man, having ſome intereſt in a ſhip or cargo, to inſure more, or five times as much, becauſe a merchant cannot tell how much, or how little his factor may have in readineſs to lade on board his ſhip; yet it is not ſaid that, in caſe

(*a*) *Pothier*, h. t. n. 148. 156.——(*b*) *Dig.* lib. 13. tit. 6. n. 17.——(*c*) *Pothier*, h. t. n. 157.——(*d*) Ord. de la mar. h. t. art. 53, 54, 55——(*e*) *Emerig.* vol 1. p. 271, 272.——(*f*) *Valin* ſur art. 23. p. 67. *Pothier*, h. t. n. 78.——(*g*) 2 *Vern.* 270. ſup. 123.

of loss, the insured would be permitted to recover more than the real amount of his interest: And in a subsequent case (a), in the year 1716, the Lord Chancellor ordered the insured, in a valued policy on goods, to discover what goods he really had on board.

After they were held legal.

After gaming policies, which must necessarily be in the form of valued ones, came to be considered as legal contracts, it could be of little importance whether the interest of the insured amounted to the value specified in the policy or not; because the contract would be equally binding on the underwriters, whether it should prove to be a policy on real interest or a mere wager. Therefore, before the stat. 19 *G.* II. c. 37., it could not have been thought necessary, at least in the opinion of those who maintain the legality of gaming policies, that the insured upon a valued policy should prove any interest at all.

The effect of the valuation since the statute.

After the passing of that act, the value in the policy, it would seem, ought only to have been considered as *prima facie* evidence of the amount of the interest of the insured. For though this value is admitted by the insurer; yet, as he admits it upon the mere representation of the insured, if he should afterwards find that this value was fictitious, and only meant as a cover for a wager, it cannot be supposed that he was so far concluded by his admission, as not to be at liberty to open the question of interest, to dispute the valuation, and shew by evidence that it was a mere evasion of the act. Even supposing the underwriter to be fully apprised that the valuation was fictitious, yet, as the statute was not made for his benefit, but for purposes of general policy, there can be no doubt of his being at liberty, if he think proper, to object the want of interest, in like manner as a rector may recover in ejectment against his own lessee, on the ground that the lease of the rectory has been avoided by his own non-residence, by force of the stat. 31 *El.* c. 20. (b).—Lord *Mansfield* in delivering the opinion of the court in the case of *Lewis* v. *Rucker* (c),

(a) *Le Pypre* v. *Farr*, 2 *Vern.* 716. sup. 124.——(b) Vid. *Frogmorton* v. *Scott*, 2 *East* 467.——(c) 2 *Bur.* 1171.

says;

says;—"A valued policy is not to be considered as a wager, or like *interest or no interest*. If it were, it would be void by the stat. 19 *G* II. c. 37. The only effect of the valuation is, the fixing the amount of the prime cost, just as if the parties were to admit it at the trial. But in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity. If it be undervalued the merchant himself stands insurer for the surplus. If it be much over-valued, this must be done with a bad design; either to game, contrary to the statute, or with some view to a fraudulent loss.—Therefore, the insured can never be allowed in a court of justice to plead that he has greatly over-valued, or that his interest was a trifle only." Thus far his lordship strongly fortifies the idea that the value in the policy is only *prima facie* evidence of the interest of the insured, which may be impeached by the underwriters, if they see cause for doing so. But his lordship adds, "It is settled that, upon a valued policy, the merchant needs only to prove *some interest*, to take it out of the statute; because the adverse party has admitted the value; and if more were required, the agreed valuation would signify nothing. But if it should come out in proof that a man had insured 2000*l.*, and had interest on board to the value of a cable only; there never has been, and I believe there never will be, a determination, that, by such an evasion, the act of parliament may be defeated."—His lordship, however, must not be understood here to mean that, provided the insured has a real substantial interest on board, he may by a valued policy, insure to any amount, and recover the whole sum insured, however this may exceed the real value of the goods. He seems, indeed, to have been of opinion that the policy ought not to be deemed void, unless the value specified in it be a mere *cover for a wager*; but that where the insured has a real and substantial interest on board, though *much over-valued*, the contract will be valid; and the insured, in case of loss, entitled to recover to the amount of his real interest.

Yet,

The practice of permitting the insured upon a valued policy to recover the whole sum insured, upon a total loss, though his interest be less than that sum, is against the stat. 19 G. II. c. 37.

Yet, in the case of *Le Cras* v. *Hughes*, which has been already particularly noticed (*a*), the court of King's Bench declared that, in cases where the interest of the insured is less than the sum insured, in a valued policy, it is the constant usage, upon a *total loss*, to pay the whole sum insured; but, upon a *partial loss*, to consider it as an *open policy*, and to compute the loss according to the value of the *goods on board*.—And Lord *Mansfield*, in delivering the opinion of the court in that case, said,—"The constant usage since the stat. 19 *G.* II., in case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it: But an average loss opens the policy. I will give you the origin of this: It was in a case of *Erasmus* v. *Banks*, *Mich.* 21 *G.* II., when Lord C. J. *Lee* said, *valuation at the sum insured is an estoppel in case of a total loss; but not so in the case of an average loss only.*' On the 13th of *December* 1747, the same point came again before the court in *Smith* v. *Flexney*, and was so determined (*b*)."—That such has been the usage is unquestionably true, and that it has been sanctioned by the approbation of great and eminent judges, as in the cases alluded to, is equally true: But how it can be reconciled with the provisions of the stat. 19 *G.* II. c. 37., is not quite so clear. This practice has a manifest tendency to interest the insured, if not in procuring fraudulent losses, at least in endeavouring to convert every loss into a *total one.*

So, a valued policy on a commission expected as consignee of a cargo, is not a wager.

So, where the interest was delcared by the policy to be *on the commission of the insured*, as consignee of the cargo, valued at 1,500*l.*, Lord *Kenyon* is said to have expressed a very strong opinion that this was a good insurable interest (*c*).

A valued policy on profits expected on a cargo of goods, is not within the act.

In the cases of *Grant* v. *Parkinson*, and *Barclay* v. *Cousins*, which have been already fully stated (*d*), it was determined that, upon a valued policy, it was incumbent on the insured, since the statute, to prove *some interest*, but

(*a*) Sup. 108.——(*b*) Vid. 2 *East* 113.——(*c*) *Flint* v. *Le Mesurier*, at N. P. after *Hil.* 1796, *Park.* 268.——(*d*) Sup. 97, 99.

that

that it was not neceſſary for him to go into the whole value; that *expected profits* were inſurable; and that the meaning of a valued policy was, not to evade the act, but to avoid the difficulty of going into an exact account of the *quantum*.

In the following caſe it was determined that if the thing inſured be of the eſtimated value *when the ſhip ſails*, this will bind the underwriters; and that, in the caſe of a total loſs, they will be liable to the amount of the value in the policy, though at the time ſuch loſs happened the thing inſured be greatly diminiſhed in value; and though part of it had been employed in the purchaſe of goods, which were preſerved and ſold at a good market, and not abandoned to the underwriters.

Shaw v. Felton, 2 *East.* 109.

A ſhip and goods are inſured in a *valued policy*, to *Africa* and the *West Indies*. Part of the goods are employed in the purchaſe and ſuſtenance of a cargo of ſlaves. The ſhip, after landing the ſlaves at the port of deſtination, but before the riſk ended, is loſt.—The inſurers are liable to the full amount of the value in the policy; though this value be greatly diminiſhed by the purchaſe and ſuſtenance of the ſlaves, and though only the *wreck of the ſhip* be abandoned.

An inſurance was made upon the ſhip *Indian*, and goods on board, *valued at* 6,600*l.*, 'at and from *Liverpool* to the coaſt of *Africa*; during her ſtay and 'trade there; and from thence to her port or ports of 'diſcharge, ſale, and final deſtination in the *Weſt Indies* 'and *America*.'—The inſured were intereſted in the ſhip and out-fit, including proviſions and ſtores to be taken in on the coaſt of *Africa* for the ſlaves, and alſo wages advanced to the crew; and theſe, according to the uſual mode of valuing in ſuch caſes, amounted to the ſum ſpecified in the policy.—The ſhip having taken in a cargo of ſlaves on the coaſt of *Africa*, ſailed for *Demerara*. In the courſe of her voyage thither, in calm weather, and in deep water, ſhe met with a *ſhock* or *concuſſion*, deſcribed to reſemble an *earthquake*, from which ſhe received ſo much damage, that it was with the greateſt difficulty ſhe was kept afloat till ſhe reached *Demerara*, where ſhe was laſhed alongſide a hulk about fifty yards from the ſhore to keep her from ſinking, and in attempting to remove her to the ſhore a few days after, ſhe ſunk. When ſhe arrived at *Demerara* her ſtores were conſiderably expended. She had been deſtined thither, in the firſt inſtance, with directions to the captain to proceed to other places, in caſe he could not obtain certain prices there for the ſlaves; and, as the veſſel was not built according to the regulaions of the late act of parlia-

ment,

ment (a), he should sell her in the *West Indies*, provided he could get 1200*l*., or even 1000*l*., for her; otherwise he was to procure a freight for her to *Liverpool*. In fact, the vessel being surveyed at *Demerara*, was condemned and sold there for 388*l*. The slaves were also disposed of there; and though not, perhaps, so advantageously as they might have been disposed of elsewhere, yet still so as to amount to the average prices limited by the captain's instructions.—The insured, having abandoned, brought an action on the policy; and, upon the trial of the cause, the plaintiff obtained a verdict for the full amount of the sum insured.—The defendant moved for a new trial, upon the ground that the subject matter of the insurance was, at the time of the loss, so much reduced from the original valuation, that this ought not now to conclude the underwriters; that not only the real worth of the ship, by the owners own admission, was so much less than the stipulated value, but that the stores which were included in the insurance to the amount of 3,000*l*., were profitably expended in the purchase and sustenance of the slaves, all of whom had been brought to an advantageous market; and therefore the subject matter of the insurance, as to so much, was not lost to the insured, but arrived at the place of destination; and so far, therefore, was the plaintiff from sustaining any loss in this respect, that he was in fact a gainer by the adventure; that the same observation would apply to about 400*l*. seamen's wages paid in advance, and included in the policy; and that, as the object of the voyage was accomplished, this could not be a total loss. —But the court determined that this must be considered as a total loss.—Lord *Kenyon* said;—"It is not contended that there is any fraud in this case, but only that the underwriter is not bound by the valuation in the policy. It is of little consequence what my opinion would have been upon the subject of valued policies in the year 1746, immediately after the stat. 19 *G*. II. passed; for

(a) One of the acts for regulating the slave trade, which was to take place after the voyage in question had commenced.

they

they were very soon after decided to be legal by Lord C. J. *Lee*, and from that time to the present such policies have been sanctioned by one uniform course of decisions. All this is now supposed to be wrong; and the rules by which this and other commercial nations have so long regulated their dealings are now wished to be distnrbed; but I will not lend my aid to open such a new and wide door of litigation. If we were to enter into the calculations which have been contended for, every valued policy would be to be opened. Every man's meal on board a ship would take from the value of the original out-fit. Is this to be endured? Will good faith admit of it? Where is the line to be drawn between a greater and a less diminution of the value? Therefore, as the rule and practice of valued policies have been acted upon since the passing of the act, I am not one who wish *quieta movere.*"—The other judges concurred in these sentiments.—Mr. Justice *Lawrence* said,—"The statute was made in order to prohibit mere wagering policies by persons insuring who have no interest in the thing insured. The effect of a valued policy is, not to conclude the underwriter from shewing that the insured had no interest, and that in fact it is a mere wager policy within the statute; but, to avoid disputes as to the insured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject matter of the insurance was not at first of the value estimated in the policy. Would it not be sufficient in the case of an open policy, to prove that, at the time the ship sailed, the thing insured was of such a value? Is not that the period to look to, and not to the state of the thing at the time of the loss happening?"—Mr. Justice *Le Blanc* said,—"In every insurance upon ship and out-fit, the value of the property must be continually diminishing; and if the loss happen at the latter end of the voyage, as in this case, no doubt the property must be considerably deteriorated by the usual wear and tear; and yet it is never objected that the underwriter is not liable for the original value.—The rule having been so long laid down as to valued policies, it is now too late to open it again."

If the thing insured be of the value in the policy, *at the time the ship sails*, it is sufficient.

This

Observations on this case.

This very singular case challenges particular notice.— Had the insurance been on the ship and her ordinary stores only, the original valuation, having been fair when made, would unquestionably have been conclusive, however the one might have been deteriorated in value by wear and tear, or the other diminished by the ordinary consumption of the voyage. But here, beside the ordinary stores, the ship sailed with a *cargo* on board, to the value of 3,000*l.*, which was employed in the purchase of slaves on the coast of *Africa*, and their sustenance during their voyage to *Demerara*; and these slaves, after the accident happened, and before the ship sunk, were safely landed at *Demerara*, and there sold to advantage. But it is a settled principle that, where an insurance is upon goods generally, if the ship touch at any port in the course of her voyage, at which she has liberty to trade, and there unload the goods, and take others on board, either in exchange for them, or purchased with the proceeds of them, these goods newly taken on board are substituted in the policy for those that were landed; and the insurers become liable to the risk upon them in like manner as upon the original goods (*a*). Hence it would seem that the slaves taken on board on the coast of *Africa*, which were purchased and fed with the produce of the original cargo, became part of the subject matter of the insurance, and were protected by the policy, to the extent of the sum insured, in the voyage from *Africa* to *America*. If this were so, then it would seem that the insured had no right to claim as for a total loss upon an abandonment of the ship only (*b*). Upon a valued policy the underwriters are not deprived of the benefit of salvage.

In what case goods taken on board in the course of the voyage are protected by the policy.

(*a*) *Valin* sur art. 27. h. t. p. 78.; *Emerig.* t. 2. p. 38. *Pothier* h. t. n. 63.——(*b*) Vid. inf. ch. 13. s. 4.

Sect.

Sect. III.

Of Re-insurance.

A POLICY of insurance being once signed, the underwriters are bound by the terms of it; nor can they be released from their contract, without the consent of the insured (*a*). But if an underwriter repent of what he has done; if he be afraid to encounter the risk he has engaged to run, or find that he has incautiously bound himself to a greater amount than he may be able to discharge, he may shift it, or part of it, from himself to other insurers, by causing a *re-insurance* to be made on the same risk, upon the best terms he can, and the new insurers will be responsible to him in case of loss, to the amount of the re-insurance (*b*). But they will be answerable to him only, and not to the original insured, who can have no remedy against them, in case of loss, even though the original insurer become insolvent; because there is no privity of contract between them and the original insured. If, therefore, the original insurer fail, so that the original insured receive only a dividend, however small, the re-insurer can gain nothing by this, but must pay the full amount of the loss to the original insurer (*c*). *Assecurator post factam assecurationem potest se assecurari facere ab alio assecuratore; et iste secundus assecurator tenetur pro assecuratione facta à primo, et ad solvendum omne totum quod primus assecurator solverit, et ista secunda assecuratio valet* (*d*).

If an insurer desire to be relieved from his responsibility, he may re-insure the same risk.

But the re-insurer is only responsible to the original insurer and not to the original insured.

Thus stands the law on this subject in most of the maritime states of *Europe*. But in this country it was found, about the time when the stat. 19 *G. II.* c. 37. was made, that this mode of insurance, though perfectly reasonable, when confined to its proper object, had been

But in *England*, by the 19 *G. II.* c. 37. s. 4. re-insurances are prohibited, except in case of the insolvency or death of the original insurer.

(*a*) *Emerig.* tom. 1. n. 8. *Roccus*, h. t. n. 12.——(*b*) Vid. *Le Guidon*, c. 2. art. 19, 20. *Valin.* h. t. art. 20, p. 65. *Pothier*, h. t. n. 96.——(*c*) Vid. *Emerig.* tom. 1. p. 248.——(*d*) *Roccus*, h. t. n. 12.

perverted

perverted from its original use, and was employed as a mode of speculating in the rise and fall of premiums; and the legislature foreseeing that it might be used as a colour for wager policies, and a means of evading the provisions of that act, declares, (sect. 4.) 'That it shall 'not be lawful to make re-insurance, unless the insurer 'shall be insolvent, become bankrupt (*a*), or die; in either 'of which cases, such insurer, his executors, adminis-'trators, or assigns, may make re-insurance to the amount 'of the sum before by him insured; provided it be ex-'pressed in the policy to be a re-insurance (*b*).'

This clause extends not only to *British*, but also to foreign ships.

This clause, having no words to confine its operation to ships belonging to *British* subjects, like the first clause of the act, restraining insurances *interest or no interest* (*c*), extends to re-insurances made in *England* on foreign ships, even where the first insurance was made abroad. This has been so determined; though it is observable that the following case, in which that question was made, was not the species of re-insurance above described, and to which only the statute refers, but a *second insurance*, effected on account of the *original insured* (*d*). The point, however, was determined by the court.

Andree v. *Fletcher*, 2 T. R. 161.

Therefore a ship insured at *Marseilles* cannot be again insured here, unless the first insurer be insolvent or dead.

That was the case of an insurance made in *London*, on a *French* vessel, which had before been insured at *Marseilles* for the same sum, by an insurer there, who, at the time of subscribing the second policy, was living and solvent, and who, in fact, afterwards paid the sum insured by him.—Upon this case the court determined that the latter policy was void by the words of the act; for

(*a*) By the 19 *G.* II. c. 32. s. 2. 'When the obligor in any 'bottomry or respondentia bond, and the insurer in any policy 'of insurance, becomes bankrupt before any loss happens, the 'obligee in such bond, and the insured in such policy of in-'surance, may prove their debts and losses under the commission, 'and receive a dividend; and the bankrupts shall be discharged 'from such debts, in like manner as if the loss had happened 'before such bankruptcies.'—Vid. *inf.* s. 6. art. 5.——— (*b*) Vid. *Edgar* v. *Fowler*, 3 *East* 222. inf. ch. 8. s. 2.——— (*c*) Sup. 127.———(*d*) Vid. inf. Lord *Mansfield*'s distinction between a re-insurance and a double insurance.

though

though the first clause of the act, which prohibits insurances, '*interest or no interest*,' is confined to insurances on *British* ships, yet the fourth section being general, and without any such restrictive clause, every re-insurance in this country, either by *British* subjects or foreigners, on *British* or foreign ships, is declared void by the statute, unless the first insurer be insolvent, become bankrupt, or die.

Two other kinds of re-insurance.

There are two other kinds of re-insurance; the one where the insured insures the solvency of the insurers; the other, where he makes a new insurance in consequence of the insolvency of an insurer during the continuance of the risk.

Insurance of the solvency of the insurer.

The insurance of the solvency of an insurer is permitted and practised in some foreign countries (*a*); but it seems never to have been in use among us; not, perhaps, as has been supposed (*b*), because the solvency of an underwriter is not an insurable interest, or that such an insurance would be deemed a wager; but, more probably, because the insolvency of an insurer seldom happens in *England*; besides, a *double insurance* would better answer the end proposed.

The practice in *France* in case of the insolvency of an insurer.

In *France*, if an insurer fail during the continuance of the risk, the insured may insist on the dissolution of the contract, unless the creditors of the insolvent insurer, in order to entitle themselves to receive the premium, (which is rarely paid in that country till after the risk is ended), will give security for the payment of the sum insured, in case of loss. At *Marseilles*, (for in *France* different practices prevail in different provinces), the insured, in such case, sues the insolvent insurer till he obtains a sentence authorizing him to re-insure at the expence of the insolvent, which he may deduct from the stipulated premium, if it be not paid, and if this be insufficient, then out of the effects of the insolvent (*c*).

(*a*) Vid. *Le Guidon*, c. 2. art. 20. Ord. of *Louis* XIV. h. t. art. 20. *Valin*, h. t. 65, 2 *Magens*, 190. 419.——(*b*) *Park*, 280.——(*c*) *Valin*, h. t. art. 20. p. 65. *Pothier*, h. t. n. 190. *Emerig*. tom. 1. p. 254.

Sect. IV.

Of Double Insurance.

How double insurance differs from re-insurance.

DOUBLE insurance is where the insured makes two insurances on the same risk, and the same interest. It differs from re-insurance in this, that it is made by the *insured*, with a view of receiving a double satisfaction in case of loss; whereas a re-insurance is made by a former insurer, his executors or assigns, to protect himself and his estate from a risk to which they were liable by the first insurance. A re-insurance, except in the cases permitted by the stat. 19 *G.* II. c. 37. § 4. (*a*) is absolutely void; but a double insurance, though it be made with a view to a double satisfaction in case of loss, and is therefore in nature of a wager, is not void by the law of *England*. The two policies are considered as making but *one insurance*. They are good to the extent of the value of the effects put in risk; but the insured shall not be permitted to recover a double satisfaction. He may sue the underwriters on both the policies, but he can only recover the real amount of his loss, to which all the underwriters on both shall contribute in proportion to their several subscriptions. And therefore, if he should content himself with suing only on one of the policies, the underwriters on that policy may recover a rateable contribution from those on the other (*b*).

Though in nature of a wager, it is not void: But the insured can only recover one satisfaction on both policies.

Newby v *Reed*, at *N. P.* 1 *Bl.* 416.

Those who pay the loss may recover a rateable proportion from the other insurers.

This

(*a*) Sup. 129 —— (*b*) *Le Guidon*, ch. 2 art. 16 & 18. ch. 3. art. 3. lays it down that if there be several policies on the same cargo, those of prior date shall be preferred. If there be an over insurance in one policy, it shall not be reduced rateably upon all, but the latter insurers, whether for gain or loss, shall withdraw their subscriptions, on receiving one half *per cent*. The Ord. of *Amsterdam*, art. 20, 23. agrees with the law of *England* in this, that all the insurers, upon several policies, shall participate equally in profit and loss.—The Ord. of *Louis* XIV. u. t. art. 23, 24, 25. declares that if the sum insured by a *single policy*, without fraud, exceed the value of the goods, the policy shall be good to the extent of their true value; and in case of loss, every insurer shall contribute

This was not always the rule, as we shall see presently; but it was so determined by Lord *Mansfield*, in the year 1763; and it was then agreed to be the course of practice, that, upon a double insurance, though the insured is not entitled to two satisfactions, he may, in an action upon the first policy, recover the whole sum insured, and leave the defendants therein to recover a rateable contribution from the other insurers.

The two following cases will also serve to shew Lord *Mansfield's* sentiments more fully on this subject.

The first was a valued policy 'on a ship and freight, 'and on goods, as interest might appear, from *Newfound-'land* to *Dominica*, and from thence to the port of dis-'charge in the *West Indies*.'—The ship sailed from *St. John's* on the 17th of *December* 1775, and the plaintiff declared as for a total loss. The defendant who had underwritten for 200*l.* paid into court only 124*l.*, on a supposition that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool*, on a voyage 'from *Newfound-'land* to *Barbadoes* and the *Leeward Islands*,' with an exception of *American* captures; but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage,

Rogers v. *Davis*, at *N. P.* in *Mich.* 17 *G.* III. *Beawes*, lex merc. 242.

contribute in proportion to his subscription, and return the premium upon the surplus. If the insurance be by several policies, and the first amount to the value of the goods, it shall stand alone, and the underwriters upon the others shall be discharged, and *return the premium*, subject to the usual deduction.—If the first policy be not sufficient to cover the full value, the second shall answer for the deficiency.—If there be several *dates* to the several subscriptions in the same policy, each date makes a separate contract, and ascertains the order of the liability of each underwriter. But if several policies have the same date, they make but one policy. Vid. *Valin* sur art. 24, &c. p. 69. *Pothier*, h. t. n. 77, *Cleirac*, p. 243. *Emerig.* tom. 2. p. 163.—Vid. also *Mal.* lex merc. 118. where he lays it down that if the effects be over insured, the loss shall fall on the first underwriters, and the rest shall return their premium, deducting one half *per cent.* This, he says, is founded on the custom of merchants, which in matters of insurance is more to be regarded than the law. Vid. inf. c. 14. s. 1. n. 1,

 made

made the present insurance. The plaintiff now insisted, that he was entitled to the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool* (*a*). There was a verdict for the plaintiff for his full demand, *leaving the defendant at liberty to bring an action against the* Liverpool *underwriters, if he thought fit.*

Davis v. *Gildart*, at N. P. after *Eas.* 17 G. III. Bench.

An underwriter who has paid a loss upon one policy, may sue the underwriters on the other for contribution.

Accordingly in the *Easter* term following, *Davis*, who had been the defendant in the last action, brought an action against the present defendant, who was an underwriter upon one of the *Liverpool* policies, to recover a contribution for the loss which the present plaintiff had been obliged to pay.—It was agreed by both parties to admit, that on the *London* policy, (which was the subject of the former action), 2,200*l.* were insured; that on the two *Liverpool* policies 1,700*l.* were insured; that the merchant was interested to the amount of 500*l.* on the ship, 300*l.* on the freight, and 1,400*l.* on the cargo; that the plaintiff had paid 200*l.* loss, and 47*l.* for the costs. The whole interest was 2,200*l.*, and the whole insurance was 3,900*l.*—The question was, whether the defendant was liable to contribute any thing, and what. It was insisted on the part of the defendant, that the insurance in *London* was an illegal *re-insurance*; and therefore the plaintiff might have made a good defence in an action brought against him: And if so, he could not now recover over, against the defendant, in the present action. —Lord *Mansfield* said,—"The question seems to be whether the insured has not two securities for the loss that has happened. If so, can there be a doubt that he may bring his action against either? It is like the case of two sureties; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance be void, as a *re-insurance*. But a re-

(*a*) This fact does not seem to have been much regarded either in this or the following case.

insurance

insurance is a contract made by the insurer to secure himself; *and this is only a double insurance.*"

Formerly in the case of an *over insurance*, the first underwriters were liable to the extent of the loss, and the rest discharged.

Yet, from the following decision it will appear, that, in the case of an *over-insurance*, that is, where, in a single policy, the sums subscribed amount to much more than the value of the effects insured, the first underwriters on the policy were formerly holden to be answerable to the extent of the loss, and the subsequent ones discharged.

The *African Company* v. *Bull* 1 Show. 132. Gilb. 238.

To an action brought on a policy on goods, the defendant pleaded a *custom of merchants*,—"That where a policy is subscribed by a number of underwriters, and the goods are not equal in value to the sums subscribed, the underwriters, in case of loss, shall be liable in the order in which they subscribe; and that the remaining underwriters shall be exonerated from all responsibility, and return the premium, deducting one half *per cent.*" The plaintiff replied that this was so, if none were insolvent, and traversed the custom as pleaded.—It is stated that, at the trial, the custom was proved plainly and fully, "*by all the Exchange*;" and the court held the custom reasonable, and judgment was given for the defendant.

It appears from the argument of this case, that such insurances were made when a merchant did not know whether his factor would send home any goods, or how much.—But the custom here proved *by all the Exchange* seems now to be forgotten; for at present the underwriters, upon a policy in which there is an over-insurance, would be held all liable in proportion to their several subscriptions, without any regard to priority of dates.

But different persons may insure the same thing, upon distinct interests, and each recover the full value of the thing insured.

Though the same person cannot, upon a double insurance of his full interest, by different policies, recover more than one satisfaction; yet, according to the following case, if the same person be not to have the benefit of both policies in all events, it cannot be deemed a double insurance; and different persons may insure the same thing upon distinct interests, to the amount of such interests, even to the full value of the thing insured, and each may recover to that amount (*a*).

(*a*) Vid. sup. ch. 4. f. 1.

 Thus:

Godin & al. v. Lond. Assur. Co. 1 *Bur.* 489. 1 *Bl.* 103.

A, at *Petersburgh*, being indebted to *B.*, in *London*, ships goods to *B.*, and promises to send him the bill of lading; and *B.* insures 1,400*l.* on these goods. Afterwards *A* informs *B.* that he has shipped goods for *London*, and desires him to insure, and he insures 900*l.*, in all 2,300*l.* on goods. After this, *A.* having shipped the goods, indorses the bills of lading to *C.* at *Petersburgh*, who sends them to *D.* his correspondent in *London*, with directions to insure the whole. *D.* accordingly insures 2,300*l.* for *C.* with different insurers, and gives them notice of the former insurances on the same goods by *B.* The goods are totally lost in the voyage.—*C* shall recover on *his* insurance the *whole* sum insured, notwithstanding *B.*'s insurance, who had also an insurable interest.

Thus: *Meybohm*, a merchant of *Petersburgh*, corresponded with *Amyand* of *London*, to whom he was considerably indebted. *Amyand* sent a ship to *Petersburgh* for goods, which *Meybohm* sent, and promised to send the bill of lading by the next post; but never sent it. *Amyand* insured 1,400*l.* with private underwriters on these goods, on or before the 28th of *September*. In *October* he received a letter from *Meybohm*, dated the 7th of *September*, informing him that he should send him goods as *per* invoice, and desiring him to insure; and 900*l.* were insured in consequence. The two insurances, therefore, amounted to 2,300*l.* on goods. After sending this letter, *Meybohm* indorsed the bills of lading to one *Tamesz*, at *Petersburgh*, who sent them indorsed to *Uhthoff*, his correspondent in *London*, desiring him to insure the *whole*. *Uhthoff* having received the bills of lading, insured with the defendants, (the *London Assurance Company*), for 2,300*l.* "at and from the *Sound* to *London*," acknowledging that there had been a former consignment of the goods, and an insurance thereon, and that both parties were willing to be safe.—In the voyage, the ship and cargo were totally lost.—An action was brought by the plaintiffs, as trustees of *Tamesz*, against the defendants on their policy; and the question was, whether they were entitled to recover the whole, or only half the sum insured.—The court unanimously determined, that the plaintiff was intitled to recover *the whole*.—Lord *Mansfield* delivered the opinion of the court to this effect.—"As between the insurer and the insured, upon the foot of commutative justice merely, the insurers were bound to pay the insured the whole; for they have received a premium for the whole risk. If the insured be to receive but one satisfaction, natural justice says, that the several insurers shall, all of them, contribute *pro rata*, to satisfy that loss against which they have insured. When a man makes a double insurance of the same thing, by distinct policies, yet he shall only receive a single satisfaction for the same loss. And this holds, though one or both the policies be in the names of other persons; for the same person is

to

to have the benefit of both. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole. But in this case, if *Tamesz* was not to have the benefit of both policies in all events, then it never can be considered as a double insurance. Supposing, as it has been said, that by the indorsement of the bills of lading, *Tamesz* stood in the place of *Meybohm*, in respect of the insurances; yet *Amyand* had an interest of his own, and insured 1,900*l.* on ship and goods, prior to any directions from *Meybohm.* Various persons may insure various interests on the same bottom; as one person for goods, another for bottomry, &c. Here *Amyand* had a *lien* on these goods, as a factor, to whom a balance was due; and he had the sole interest in the ship, which was a part of the things insured. Besides, *Amyand* does not admit that the insurance in *October* was made on account of *Meybohm:* On the contrary, he insists upon it for his own benefit. But supposing *Amyand* had made the insurance for *Meybohm*, merely as his agent, yet, even then, *Tamesz* can neither come against *Amyand*'s underwriters, nor come at his policy: For *Amyand*, the factor of *Meybohm*, has possession of the policy, and appears to have been his creditor upon the balance of accounts. And it is now a settled point, that a factor to whom a balance is due, has a lien on all goods of his principal, so long as they remain in his possession (*a*). So that *Amyand*, even as a factor to *Meybohm*, and making the insurance on his account, is yet intitled to retain the policy, having a *lien* upon it, while it is in his possession, for the balance due to him from *Meybohm.*—And *Tamesz* must have paid this balance, before he could have gotten *Amyand*'s policy out of his hand; and consequently he was far from being intitled to it as a *cestui que trust*, absolutely and entirely.—But even if this were doubtful, yet *Tamesz* insured under the express declaration of his suspicion that there might have been a former insurance upon the goods by some other person; but desired to in-

If the whole loss be recovered from one insurer, he is intitled to contribution from the others.

But various persons may insure various interests in the same thing.

A factor to whom a balance is due, has a *lien* on all goods of his principal in his hands, and may retain the policy.

(*a*) Vid. *Kruger* v. *Wilcox*, *Amb.* 252.

sure the whole for his own security; and to this the defendants agreed, and took the whole premium. It would therefore be neither just or reasonable, that *Tamesz* should recover only half his loss from the defendants, and be turned round for the other half to the uncertain event of a long and expensive litigation. *Tamesz*, therefore, has a right to recover the whole loss from the defendants. For though here be two insurances, yet it is not a double insurance. A double insurance is, where a full value of interest is insured on different policies by the same man. Two persons may insure different interests in the same thing, each for the whole value. *Tamesz* is entitled to receive the whole from the defendants, whatever shall become of *Amyand*'s policy; and they will have a right, in case he can claim any thing under *Amyand*'s policy, to stand in his place, for a contribution to be paid by the other underwriters. Therefore, upon these grounds, in every light in which the case can be put, we are all clearly of opinion, that the verdict is right *for the whole*."

Distinction between two insurances on different interests, and a double insurance.

It is not easy to reconcile this decision with the principle of the stat. 19 G. II. c. 37. (a). It cannot be contended that the policy could have had a validity in the hands of *Amyand* which it would not have had in the hands of *Meybohm*. But in the hands of *Meybohm*, after he had parted with all his interest in the goods to *Tamesz*, it would have been an insuranc. without interest. *Tamesz* having insured the goods on his own account, could have no occasion for the policy effected by *Amyand*; and, if he had procured it either from *Meybohm* or *Amyand*, it would, in his hands, I conceive, have rendered his own policy a double insurance; and he could have recovered on both but one satisfaction. The defendants taking the premium with notice of the other policy, could not give validity to an insurance without interest.

Observations on the above case.

To enable the defendant, in an action on a policy, to discover whether there be a double insurance, he may, by the authority of the stat. 19 G. II. c. 37. § 6. call upon the plaintiff to declare in writing, what sums he has insured in the whole, and how much he has borrowed on bottomry or respondentia.

A defendant sued on a policy may oblige the plaintiff to declare how much he has insured in the whole.

(a) Sup. 127.

CHAP. V.

Of the Ship.

HAVING shewn who may be parties to this contract, what may be the subject matter of it, and what interest the insured must have therein; we are next to examine what belongs to the ship or vessel which is to perform the voyage insured.

In every marine insurance the ship must be an object of great interest to both parties. From the nature of the contract, there are certain stipulations or conditions implied in it, relative to the ship, which the insured is bound to fulfil. These are, that the ship shall be sea worthy; that she shall not be changed, unless from necessity, without the consent of the insurers; and that she shall be employed, conducted, and navigated with reasonable skill, and according to law. These matters which embrace all that it will be necessary here to offer on the subject of the ship, will be considered under the following heads:

I. *Of the Sea-worthiness of the Ship;*

II. *Of changing the Ship;*

III. *Of Insurances on Goods in "Ship or Ships;"*

IV. *Of the Employment and Conduct of the Ship.*

Sect. I.

Of the Sea-worthiness of the Ship.

THERE is, in every insurance, whether on ship or goods, an implied warranty that the ship shall be sea-worthy when she sails on the voyage insured: that is, that she shall be "*tight, staunch, and strong, properly manned, provided with all necessary stores, and in all respects fit for the intended voyage.*"—The consideration of the

There is an implied warranty in every policy that ship shall be seaworthy.

insurance is paid, to the intent that the insured may be indemnified against certain contingencies; and it supposes that the insurer may gain the premium: But if the ship be incapable of performing the voyage, there is no possibility of his gaining the premium; and in that case, the contract, on his part, would be without consideration, and consequently void.—The insurer undertakes to indemnify the insured against the *extraordinary and unforeseen perils of the sea;* and it would be absurd to suppose that any man would insure against those perils, but in the confidence that the ship is in a condition to encounter the *ordinary perils* to which every ship must be exposed in the usual course of the voyage proposed.

There are different degrees of sea-worthiness, which if known, may affect the rate of premium.

It is true that there are different degrees of sea-worthiness. One ship may fairly be thought capable of performing a given voyage, and may, to a common intent, be deemed sea-worthy with reference to that voyage. Another may be in a condition to encounter much greater stress of weather, and consequently to survive where the former must perish. No underwriter, knowing the difference between these two ships, would insure each at the same premium. And yet, the implied warranty renders it unnecessary, in the first instance, to disclose any thing that forms an ingredient in sea-worthiness; for it is a rule that no representation needs to be made to the underwriters of any thing which the insured warrants (*a*). If information be particularly called for, the insured is bound to disclose truly what he knows upon the subject: But, provided the ship be in a condition to encounter the ordinary perils of the intended voyage, it is unnecessary to communicate, unsought, a circumstance which, if disclosed, might have the effect of enhancing the premium (*b*).

But nothing relative to sea-worthiness need be disclosed unless required.

It is not necessary that the ship should be sea-worthy till she sails.

It is not necessary that the ship should, in all cases, be sea-worthy from the moment the policy attaches and the risk commences. By the words "*at and from,*" the risk on a ship is often made to commence while she is in dock,

(*a*) *Per Cur. Shoolbred* v. *Nutt,* inf. ch. 11. s. 2.——(*b*) Vid. *Heywood* v. *Rodgers,* inf. ch. 11. s. 2.

dock, and undergoing the requisite repairs to render her sea-worthy, and capable of performing the intended voyage. If the ship, at the time the risk commences, be in such a state as her situation then requires, that is sufficient; nor is it necessary that she should be completely sea-worthy till she sails on the voyage insured.

Thus: A ship was insured '*at and from Liverpool* 'to the coast of *Africa*;' but, at the time the policy was effected, the ship was not in a condition to go to sea, but was, in fact, then undergoing material repairs: —In an action to recover a loss upon this policy, the underwriters contended that, as the risk described in it was *at* as well as *from*, if the ship was not sea-worthy, from whatever cause, when the policy attached, the contract was void; and that any repairs done afterwards, though they rendered her completely sea-worthy at the time of sailing, would not cure that defect.—But Lord *Kenyon*, who tried the cause, said, that, "Under the words, "*at and from*," it is sufficient if the ship be sea-worthy *at the time of sailing*; for, from the nature of the thing, the ship, while *at* the place, was probably undergoing some repair." *Forbes v. Wilson, at N. P. after Easter 1800.*

By the law of *France* it is directed, that every merchant ship, before her departure from the place of her out-fit, shall be surveyed by certain officers appointed for that purpose, and reported to be sea-worthy, '*en bon* '*état de navigation*;' and that, previous to her return, before she takes her homeward cargo on board, she shall be again surveyed.—*Valin* (*a*) shews how little confidence is to be placed in these surveys, which, he says, are only made upon the external parts, for the ship is not unsheathed, and therefore the inward and hidden defects are not discovered.—Indeed it seems to be much better to leave the *validity of the policy* to depend on the sea-worthiness of the ship, to be ascertained after a loss has happened, by an investigation of the true cause of such loss, than to permit so important a question to be decided by the report of mercenary officers. A ship may, to all appearance, be perfectly capable of performing a voyage, and it is only after a loss has happened that her latent

Previous Surveys.

What credit due to them.

(*a*) Tit. *fret.* art. 12.

defects

defects are discovered, and her true state at the time of her departure comes to be known. Nor is the survey thus made by the *French* conclusive to prove that the ship at her departure was sea worthy. It only raises a *presumption* that she was so; but it still remains open to the insurer to shew the contrary.

A ship shall be *presumed* not to have been sea-worthy, unless it be made appear that her disability arose from some other cause.

As the insurer is only liable for losses arising from the *extraordinary and unforeseen perils of the voyage*, if the ship become innavigable, or incapable of proceeding on the voyage insured, all the writers agree that the *presumption* shall be that this proceeded from the age and rottenness, or other defect of the ship, unless it be made *appear* to have been occasioned by sea damage or some unforeseen accident (*a*). The reason assigned for this is, that by the marine law, an *indefinite* innavigability is never classed among the perils to which the insurer is liable; because a thing so subject to be injured by time and the use which is made of it, cannot be supposed always to retain its original state; and that, though a ship may, at the time of her departure, appear capable of performing the voyage insured; yet, if the voyage should prove longer than usual, her internal defects will sometimes become apparent, from time, from the pressure of the cargo, and from the action of the sea, without any extraordinary accident.

Casaregis (*b*), in support of this doctrine, cites the following decision of the *Rota* of *Florence*.—A ship, with a cargo of goods on board, failed from *Cadiz* for *Amsterdam*; and when she was off *Cape St. Vincent*, she was forced by a strong north wind to put into *St. Croix de Teneriff*, to avoid foundering. Being there surveyed, she was, by the consuls, pronounced to be *innavigable*.—The insured insisted that the above circumstances amounted to sufficient evidence of the loss, which could only be attributed to the contrary winds, which, having caused

(*a*) *Targa*, ch. 60. p. 256. *Pothier*, h. t. n. 66. *Casaregis* dis. 142. n. 15. *Valin*, art. 28, 29. & 46. h. t. p. 76. In p. 98. he says, "*La presomption est, que le mauvais état du navire vient de son propre vice.*"—— (*b*) Loc. cit.

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the ship to spring a leak, had rendered her innavigable.—The insurers replied that the insured were bound to give *conclusive* evidence of the loss; that the witnesses examined by the consul did not depose that the loss was occasioned by the contrary winds; that the leak did not shew a right to abandon, because in the course of a voyage it sometimes happens to the best ships to spring a leak, without any extraordinary sea-damage.—The judges of the *Rota* adopted these reasons, and decided in favour of the insurers. Their judgment was delivered to the effect following:—The question being, whether the ship had been declared innavigable on account of the violence of the contrary winds, or on account of some peculiar and inherent defect, *it has appeared to us*, that this being the case of innavigability, it ought rather to be attributed to the inherent defect of the ship. The bad condition of the ship is *presumed* to proceed from an ancient, certain, inherent, natural, and constantly-operating cause, rather than from the effect of the winds, which is accidental and extrinsic (*a*). Decay and rottenness are reputed the most active and most powerful causes from which innavigability can proceed (*b*). A storm is not deemed a sufficient cause of a loss, if such loss can be shewn to have proceeded from the inherent vice of the thing insured. The mere *possibility* that the injury has not been occasioned by the sea, is enough to shew that the proof of the insured is insufficient (*c*).

Emerigon, however, holds that, in consideration of the previous survey, the presumption that the ship was sea-worthy when she sailed shall prevail till the insurers shew the contrary; and he cites a number of decisions of the admiralty court of *Marseilles*, upon this point, from which it would seem that no evidence of the rottenness, or of

(*a*) *Totum damnum referri debet causæ antiquiori, originali, certæ, et intrinsecæ fragilitatis et vetustatis navis*, n. 22.—(*b*) *Vitium intrinsecum infectionis et corruptionis reputandum sit pro causâ potentiori, et majoris activitatis, ex prædictis, cui propterea principaliter effectus est attribuendus*, n. 24.—(*c*) *Sola possibilitas in contrarium sufficit, ut probatio non dicatur sufficiens*, n. 36, &c.

the

the decayed state in which the ship may be found *after she sails*, is sufficient to countervail the report of the previous survey (*a*).

And it must be owned that, in practice, though the rule, as laid down by the writers above cited, ought never to be lost sight of, many difficulties may arise from too strict an observance of it. Where a ship is lost, or is condemned in the course of the voyage, as being incapable of proceeding to her place of destination, and this cannot be ascribed to stress of weather or any accident in the voyage, the fair and natural presumption is, that she was not sea-worthy; and then it is incumbent on the insured to shew that, at the time of her departure, she was in fact sea-worthy. This presumption is founded upon principles of public policy, which require that the ship, at the time of her departure, shall be in such a state as to be capable of encountering the ordinary perils of the voyage insured; and this must be the true meaning of the words, "*tight, staunch, and strong,*" used in charter-parties. However perfect a ship may be in herself, yet, if, from the nature of her constructure, or any other cause, she be incapable of performing the voyage insured, with the proposed cargo on board, she is not sea-worthy. She must be, in all respects, fit for the trade in which she is meant to be employed. And it is a wholesome rule that the insured shall be held to pretty strict and cogent proof of this. It is also a wholesome rule, that this proof shall not only be cogent and strong to shew the ship's sufficiency at the time she failed, but also that the insured shall bring forward *all* the evidence which he has upon the subject; particularly

(*a*) *Valin*, art. 29. h. t. seems to have these decisions in his mind when discussing this point. He says,—'*On cite sur ce* '*sujét plusieurs arrets d'* Aix *et des sentences de* Marseilles *contre les* '*assureurs; mais ces prejugés, pour etre juridiques, doivent avoir* '*été rendus sur des preuves* que les navires avoient été rendus inna-'vigables par fortune de mer. *Cependant qu' est ce que ces preuves* '*pour l'ordinaire? Des procès verbaux frauduleux de la part des* '*capitaines, toujours disposés à favoriser les armateurs, sans egard* '*à la vérité et la justice.*'

what relates to the ſtate ſhe was in when the loſs happened, or when ſhe was condemned as unfit to proceed on the voyage. If any thing ſhould be withheld which the inſured might have produced, it will always throw great ſuſpicion on his caſe. Too much often reſts on the ſingle teſtimony of the maſter, always inclined to favour his employers.—If, on the other hand, it appear from the facts of the caſe, that the loſs may be fairly attributed to ſea-damage or any other unforeſeen misfortune, but yet the inſurers mean to alledge that the ſhip at her departure was not ſea-worthy, the *onus probandi* will lie on them. This ſeems to be the ſimpleſt rule; and the ſimpleſt rules are always the beſt, particularly in matters of commerce.

If the loſs or diſability of the ſhip can be aſcribed to ſea-damage, the proof of unſea-worthineſs lies on the inſurers.

The reports of perſons employed to ſurvey the ſhip, and ſentences of condemnation by vice-admiralty courts abroad, are frequently offered as evidence to prove the ſufficiency or inſufficiency of the ſhip. But ſuch reports, though made upon oath, and ſuch ſentences though ſtamped by a ſort of judicial authority, are not admiſſible evidence to prove the *facts* contained in them; becauſe better evidence, namely, that of the perſons employed to examine the veſſel, might have been obtained to prove theſe facts.

A ſentence of condemnation of a ſhip is not evidence to prove the *facts* contained in it.

Therefore, where a condemnation of a veſſel by a court of vice-admiralty abroad, after a ſurvey upon oath, was offered in evidence to prove certain defects from which the want of ſea-worthineſs at a previous time was meant to be inferred; Lord *Kenyon*, though he admitted the ſentence as evidence to prove the mere fact of condemnation, rejected it *as evidence of the facts contained in it*.

Wright v. *Barnard*, at G. H. *Mich.* vac. 1798.

If it be clearly aſcertained that the ſhip, at the time of her departure, was not in a condition to perform the voyage inſured, neither the innocence or ignorance of the inſured, nor any precautions he may have taken to make her ſea-worthy, will avail him againſt the breach of his implied warranty.

Neither the ignorance or innocence of the inſured will avail him againſt a breach of this implied warranty.

Thus;

Lee v. *Beach*, at N. P. after M. 1762.

The purchaser of a ship sends her to be docked and completely repaired, and the ship-builder is ready to swear that this was done; yet if it afterwards appear that she was not sea-worthy, though this proceed from a latent cause, the policy is void.

Thus: The plaintiff had purchased a ship, and after having her surveyed by proper persons, sent her into dock, and there had her fully repaired; and the ship-builder was ready to swear that he had effectually repaired her, as he thought, having done all that was requisite to make her a good ship. Being then taken into government service, she was, as usual, surveyed by the persons employed for that purpose, and reported to be a good ship. She sailed out of the *Thames*, and arrived at *Portsmouth*; but being very leaky in bad weather, the admiral ordered her to go into port, and undergo a survey there. This was done, and it was found, on opening her, that some timbers near her keel were very bad; insomuch, that she was condemned as insufficient to proceed. The plaintiff having insured her, brought an action on the policy to recover the loss; and at the trial insisted that he had a right to prove, and could prove, that he had done every thing in his power to send her out a good and sufficient ship; but that her disability was the effect of a *latent cause*, not known to him or discovered when she was surveyed, or in the dock repairing.—Lord *Mansfield*, who tried the cause, said that it appeared that the ship had *died a natural death*, and had received her death's blow before the risk commenced; and, however innocent the plaintiff might be, and however cautiously he had acted, the underwriter was equally innocent; and the implied warranty must and ought to have its effect; and he nonsuited the plaintiff.

Oliver v. *Cowley*, at N. P. after Tr. 1765.

And the insured's being unacquainted with the state of the ship, does not alter the case.

So, where an insurance was made on goods on board the *Amy and Letitia*, at and from *Montserrat* to *London*, the ship sailed the 16th of *July*, and the next day, without any bad weather, she was found to be very leaky, and obliged to run for the island of *St. Thomas*, where she was unloaded, and the goods, being much damaged, were sold. In an action on the policy to recover for this loss, it was agreed, on the one hand, that the ship was not sea-worthy to undertake the voyage insured; and on the other, that the insured was totally ignorant of this, when the goods were shipped.—The plaintiff was nonsuited.—Lord *Mansfield* said, that the implied warranty

 could

could not be supposed ... any case. However, as it was a question of law, he would save the point; but the plaintiff's counsel acquiesced in his lordship's decision.

Though the owners may not know the true state and condition of the ship in a distant part of the world, yet if they insure, the law will presume that the master, or some other agent, will take care that the ship be sea-worthy before she sails. Hence it is, that though a ship has been long absent in the remotest parts of the world, if an insurance be made on her homeward voyage, the warranty that she was sea-worthy at the time of her departure, is as strongly implied in the contract, as if she had sailed from an *English* port. And though no fraud be imputable to the insured; though he supposed, or believed, that the ship was in all respects sea-worthy; though no blame be imputable to the master, or any other agent of the insured; and though the underwriters were as well acquainted with the state and condition of the ship as the owners; yet, if in fact she was not sea-worthy at the time of her sailing, the contract will be void.—The following celebrated case may seem, however, to afford an exception to this rule.

If the ship be not sea-worthy, the policy is void, though both the insured and the captain believed her to be sea-worthy; and though the insurers knew the state she was in as well as the owners.

[a] An insurance was made on a ship called the *Mills Frigate*, lost or not lost, at and from the *Leeward Islands* to *London*, beginning the adventure from her arrival at the *Leeward Islands*. In an action on this policy, the loss was stated to have arisen from divers leaks sprung by the ship, from the starting of planks, by tempestuous weather and the mere perils of the sea. Upon the trial of the cause before lord Chief Baron *Parker*, the evidence on the part of the plaintiffs was to this effect: That the ship was [illegible] built, and the defendants knew her to be such; that the bolts of such ships being iron, grow rusty and break, and then the timbers suddenly become loose, and the ship is thereby rendered incapable of bearing the sea, without any *visible* marks of decay: that she had been generally employed by the plaintiffs in the *West India* trade, and largely and constantly insured on her; that before she sailed on her last voyage, she was put into complete repair, but her iron bolts

[a] *Mills* and another v. *Roebuck*, in the Exchequer, *Mich.* 1769.

seems contrary.

bolts could not then be examined without taking off her ſheathing, which had not long before been put on; that the firſt underwriter on the policy, with others, kept a regiſter of all ſhips inſured by them, containing a particular deſcription of each, and employed a ſurveyor to examine them; that the *Mills Frigate* had long been entered in this regiſter, and, before her laſt voyage, was examined by the ſurveyor, and found fit to undertake the voyage *to and from* the *Leeward Iſlands*; that the firſt underwriter knew as much of the condition of the ſhip as the plaintiffs, and underwrote 400*l.* on her outward voyage; that at *St. Kitts* ſhe had ſuch a repair as was deemed ſufficient for her homeward voyage, but her bolts could not be examined there; that at *Nevis*, where a loading was expected, the planters, knowing ſhe had been leaky on her outward voyage, refuſed to put ſugars on board her; but to ſatisfy them, a ſurvey was made by ſix captains, who reported that ſhe was ſtrong and ſound, and, when caulked, would be fully ſufficient to carry a cargo to *London*; that ſhe was accordingly caulked, and during two months, while ſhe was loading, continued tight; that the day after ſhe ſailed from *Nevis*, without any bad weather, ſhe ſprung a leak, which obliged the captain to bear away for *St. Kitts*, where ſhe arrived in two days, and it was there found that ſhe had ſtarted a plank, and on being ſurveyed, ſhe was reported to be unfit to proceed on her voyage, without a thorough repair, which would coſt more than the value of the ſhip and freight, and which, at all events, could not be had at *St. Kitts*, for want of docks and materials, and that ſhe was unfit to ſail elſewhere to be repaired; that the ſtarting of the plank was owing to the iron bolts being ruſty and decayed and breaking off in the planks; and that, as other bolts might be in the ſame ſtate, it was concluded that the ſhip was not at the time ſhe ſailed from *Nevis* for *London*, fit to perform that voyage; and this the captain now believed, though, to all outward appearance, ſhe was a good ſhip, and, as he thought when he ſailed from *Nevis*, *proper for the voyage*; but had he known the decayed condition of her bolts before he ſailed on his homeward voyage, he would not have

ventured

ventured his life in her; that while the ship was at *St. Kitts*, the captain wrote to the plaintiffs, giving them an account of his outward voyage, mentioning the bad weather he had met with, the *loosened, weak, and leaky state of the ship*, and the necessity he had been under of having *her upper works new nailed*; that the plaintiffs gave this letter to a broker to get an insurance made on the ship, freight, and cargo; which being shewn to the first underwriter, he chose to insure the ship, saying, she would come home safe enough, notwithstanding the damage she had received, it being a summer voyage; but she would very likely damage her cargo; and being about to underwrite 300*l.* the broker told him he was a bold man to write so much, after reading the letter, upon which he altered the *three* into a *two*; that the broker shewed the same letter to all the other underwriters before they underwrote.'—The defendants demurred to this evidence, upon which the court gave judgment for the plaintiffs, the insured.—A writ of error was brought in the *Exchequer Chamber*, which was referred to lord *Mansfield* and lord C. J. *Wilmot* who, after argument, reported their opinion to be in favour of the defendants in error, and affirmed the judgment of the Court of Exchequer (*a*).

The principles upon which this opinion was founded were not publicly declared, because it is not usual, upon a writ of error from the court of *Exchequer* to the *Exchequer Chamber*, for the judges, to whom it is referred, to deliver their opinions publicly. Observations on the above case.

In the first edition of this work it was stated, from the only account of this case then in print, that the judgment was in favour of the underwriters. This error probably originated

(*a*) Before this action in the Exchequer was brought, an action on the same policy had been tried in the court of Common Pleas before Lord *Camden*, who directed the jury to find for the plaintiff. But upon a motion for a new trial, he altered his opinion, and the court unanimously determined that the ship, not being sea-worthy, the plaintiffs, however innocent they might be, could not recover.

originated in the very inaccurate mention of this case in Sir *James Burrow*'s report of the case of lord *March* v. *Pigot* (*a*), where the counsel in arguing for the defendant are supposed to have stated that the insurers upon the *Mills Frigate* were holden not to be liable on account of the ship's not being sea-worthy, though the defect was not known to the insured; and lord *Mansfield* is made to answer in these words: 'I differ totally in opinion from 'that doctrine. The determination in that case was 'made upon quite another ground.—The insured ought 'to know whether his ship was sea-worthy or not, at 'the time when she *set out* upon her voyage: But how 'should he know the condition she might be in, after she 'had been out a twelvemonth.'—If this be any thing like a true statement of what his lordship said on the occasion, it is plain that his judgment had been in favour of the insured: And yet he is not made to deny that the judgment was in favour of the underwriters, but only that it proceeded upon a different ground from that stated in the argument.—Upon inquiry at the proper office, I find that in fact the judgment was in favour of the insured; but I have been unable to learn the true ground of it. That which is above supposed to have been hinted at by lord *Mansfield*, could not have been the ground, because it is contrary to the principle universally admitted, and often maintained by his lordship, namely, that the implied warranty can in no case be dispensed with. The judgment probably proceeded on the ground that the insured, by demurring to the evidence given on behalf of the plaintiffs, had admitted upon record the truth of every fact and conclusion which, upon the evidence stated, might have been found by the jury in favour of the party who adduced it (*b*). And yet, upon an attentive review of the facts stated on the record, it is not easy to reconcile the judgment to any just principle of the law of insurance.

(*a*) 5 *Burr.* 2804.—— (*b*) See the opinions of Mr. Justice *Buller*, in the case of *Cockfedge* v. *Fanshaw*, *Doug.* 134., and of lord C. J. *Eyre* in the case of *Gibson* and *Johnson* v. *Hunter*, 2 H. Bl. 205.

Where

Where the goods insured have sustained a damage in the voyage from the insufficiency of the ship, the question, whether the owner of the ship be liable to make good the loss, depends on the question, whether the ship were in a condition to perform her voyage, at the time of her departure, or became defective from stress of weather and the perils of the sea, in the course of the voyage. The owner is liable for damage occasioned by every injury arising from any original defect in the ship, or from bad stowage: But he is not liable for any injury arising from the act of God, the king's enemies, or the perils of the sea (*a*).

In what cases the *insurer*, and in what cases the *owner*, shall make good the damage done to goods from the insufficiency of the ship.

It is sufficient if the ship be sea-worthy at the time of her sailing. She may cease to be so in a few hours after her departure, and yet the underwriters will continue liable. The question, therefore, in such cases, will always be, whether her disability arose from any defect existing *before* her departure, or from a cause which occasioned it *afterwards*. But if a ship, within a day or two after her departure, become leaky and founder at sea, or be obliged to put back, without any visible or adequate cause to produce such an effect, such as the starting of a plank or other accident to which the best ships are liable, and which no human prudence can prevent, the natural presumption is, that she was not sea-worthy when she sailed; and it will then be incumbent on the insured to shew the state she was in at that time.

It is sufficient if the ship be sea-worthy at her departure.

But if a defect appear soon after sailing, without any visible cause, the presumption is, that she was not sea-worthy.

But a ship, to be sea-worthy, must not only be tight, staunch, and strong, and provided with all necessary stores for the voyage proposed; it is, as has been already observed, a condition or warranty implied in the contract, that she shall be properly *manned*, by persons of competent skill and ability to navigate her. And therefore, if she sail without a sufficient number of hands to navigate her for the voyage; or if she be suffered to sail in a river, or other place of difficult navigation, without a pilot properly qualified, the underwriters will be discharged; for this is a breach of the above condition.

To be sea-worthy, the ship must be properly *manned*.

As where a ship, insured from *Stettin* to *London*, took a pilot on board at *Orfordness*, on entering the *Thames*, who quitted

Law v. *Hollingworth*, 7 T. R. 160.

A ship takes a pilot on her entrance into the

(*a*) Vid. *Valin* h. t. tom. 1. p. 164.

Thames, but he is permitted to leave her, and an accident happens before she is safely moored: The insurers are discharged, though it do not appear that the loss was imputable to any want of skill in those who navigated the vessel.

quitted her at *Halfway Reach*; after which, and before she came to her moorings higher up the river, she struck upon a ship's anchor, which entered her bottom, in consequence of which she sunk and filled with water before she had been moored twenty-four hours.—In an action on the policy, it was objected that there was actual negligence in the management of the ship, by not keeping the pilot on board till she had been moored in safety.—Upon this ground the court were clearly of opinion that the underwriters were discharged.—Lord *Kenyon* said,—"The principle upon which this case must be determined, seems to be admitted on all hands, namely, that the insured cannot recover on a policy of insurance, unless the ship be equipped with every thing necessary to her navigation during the voyage. She must be sea-worthy, and to that end she must have a sufficient crew, and a captain and pilot of competent skill. But in this case the captain did not perform his duty; for he had no pilot on board when the accident happened. If the underwriters had been previously informed that there would be no pilot on board during a great part of the ship's passage up the river, probably they would not have undertaken the risk."

Sect. II.

Of changing the Ship.

The ship cannot be changed unless through necessity, or with the leave of the insurers.

WE have already had occasion to observe that, in almost all cases of insurance upon goods, it is necessary to specify in the policy the ship in which they are to be transported. Without having this ascertained, the underwriter would be unable to form a just estimate of the risk he is to run (*a*). It is therefore, in general, a part of the contract, that the adventure shall be on board the very ship so specified, and no other. And if, before the

(*a*) Vid. *Roc.* h. t. n. 28. *Santerna*, h. t. p. 3. n. 35. *Stracca*, glos. 8. n. 10. vid. inf. c. 8. s. 3. n. 2.

commencement

commencement of the voyage, another ſhip be ſubſtituted for the one mentioned in the policy, or if, during the voyage, the goods inſured be removed into another ſhip, without *neceſſity*, and without the conſent of the inſurers, the underwriters are diſcharged (*a*).

Some authors have thought that the underwriters are not diſcharged by a change of the ſhip, even without neceſſity, or the conſent of the inſurers, unleſs the new ſhip be worſe than that mentioned in the policy (*b*). So that if the goods inſured be removed to as good a ſhip, the underwriters will remain liable. Others doubt this doctrine (*c*). But with us, the nature and form of the contract entitle the underwriters to ſay that they had more confidence in the ſhip named in the policy, than in any other; and that, therefore, they cannot be bound to run the riſk in another, though a larger and better ſhip, without their conſent, or without neceſſity. Such alſo is the law of *France* on this point (*d*).

If ſeveral parcels of goods, inſured on board ſeveral ſhips, be put on board one of the ſhips, the policy will be good only for the parcel inſured on board that ſhip.

Therefore if a merchant inſure three ſeveral parcels of goods, each of the value of 1,000*l.*, one on board the *Neptune*, another on board the *Triton*, and the third on board the *Venus*, amounting in the whole to 3,000*l.*; but he afterwards find it convenient to load all the three parcels on board the *Neptune*: In that caſe, *Pothier* (*e*) holds, and upon grounds which ſeem to be exactly conformable to the law as underſtood in this country, that the underwriters would be liable only to the riſk on the parcel of goods to the amount of 1,000*l.*, which, by the terms of the policy, were to be laden on board the *Neptune*, and, as to the remaining 2,000*l.*, the policy would never attach.

It is not neceſſary to have a clauſe in the policy to enable the inſured to change the ſhip in caſe of neceſſity.

Molloy, however, ſeems to think that the naming of the ſhip in the policy amounts to an abſolute waranty,

(*a*) *Le Guidon*, ch. 9. art. 4. *Roccus*, n. 9. *Emerig.* tom. 1. p. 423. *Valin*, art. 26. h. t. *Conſolato del mare*, ch. 87. & 89. *Mal.* lex merc. 118. Vid. inf. c. 8. ſ. 3. n. 2.——(*b*) *Roccus*, n. 57. *Straccha* de naut. art. 3. n. 10. *Caſaregis* diſc. 1. n. 33. —— (*c*) Vid. *Emerig.* tom. 1. p. 424.——(*d*) *Emerig.* tom. 1. p. 425.——(*e*) *Pothier*, h. t. n. 68.

and that if the goods be removed to any other ſhip, though from *neceſſity*, the inſurer is diſcharged, unleſs there be a clauſe in the policy to warrant ſuch removal (*a*). But this is too rigid a contruction of the terms of the policy, and contrary to the conſtant practice of all commercial countries (*b*). At preſent no ſuch clauſe as that mentioned by *Molloy* is ever found in the policies of any country; and this, of itſelf, is a ſufficient proof that the liberty of changing the ſhip, in a caſe of neceſſity, does not require a ſpecial clauſe to warrant it.

Lord *Mansfield*, in delivering the opinion of the court in the caſe of *Pelly* v. *Royal Ex. Aſſ.* (*c*) ſays,—"One objection was made, by comparing this caſe to that of changing the ſhip or bottom on board of which goods are inſured, which the inſured have no right to do.—Anſwer:—There, the *identical ſhip is eſſential;* for that is the thing inſured: But that caſe is not like the preſent."—Perhaps it may be inferred from this, that lord *Mansfield* meant to lay it down as a rule, without any exception, that the ſhip can in no caſe be changed. The reporter does not ſtate the objection alluded to by his lordſhip; and the anſwer in which he is ſtated to have ſaid, 'that the identical ſhip is the thing inſured,' ſhews that the reporter muſt have miſapprehended him. But, be that as it may, his lordſhip could only mean to lay down the *general rule*, without ſtating thoſe exceptions ariſing from neceſſity, which the general ſcope of his argument ſeems ſtrongly to warrant.

Dick v. *Barrell*, at N. P. 2 Str. 1243.

A man inſures on any ſhip he ſhall come in from A to B, *intereſt or no intereſt*. The ſhip he firſt is in ſpringing a leak, he removes to another, and arrives ſafe; but the firſt ſhip is taken: The inſurer is liable.

Yet, where a man inſured, '*intereſt or no intereſt*, on '*any ſhip he ſhould come in*, from *Virginia* to *London*, beginning the adventure on his embarking on board ſuch 'ſhip; the money to be paid though his perſon ſhould 'eſcape, or the ſhip be retaken,' and embarked on board the *Speedwell*; but, ſhe ſpringing a leak at ſea, he went on board the *Friendſhip*, and arrived ſafe in *London*, but the *Speedwell* was taken after he left her;—Lord

(*a*) *Molloy*. b. 2. c. 7. ſ. 11.——(*b*) Vid. *Mal.* lex merc. 118.——(*c*) 1 *Bur.* 351.

J. C. *Lee*

C. J. *Lee* held that the underwriter was liable:—"For," said he, "the insurance is on the ship the insured set out in; and had that got safe home and the other been lost, he could not have recovered upon the ground of having removed his person into that ship in the middle of the voyage."

On the first view of this case, an inference seems to arise from it, that even necessity will not warrant the changing of the ship. But it is to be observed, that the ground of the decision is expresly stated to have been, that the insurance was on the *ship the insured first sailed in*, which must be confined to one ship; and that this was in truth a *mere wager*. Besides, for any thing that appears, the necessity was not great enough to warrant his leaving the *Speedwell*. But, be that as it may, this is but a loose note of a case at *nisi prius*, and is by no means sufficient to establish a principle contrary to constant practice and the usage of other countries, and which might be extremely injurious to the interests of commerce.

Observations on this decision.

The point, however, is now clearly settled in the following case, in which it was determined that the shifting of the goods insured from one ship to another, does not discharge the insurer, if this be done from necessity (a); and that the captain may even dispose of goods saved from shipwreck, and invest the proceeds in the produce of a foreign country, and these being laden on board another ship, will still be protected by the policy.

But the proceeds of goods saved from shipwreck may be invested in new goods; and the risk will continue on these in a new ship.

An insurance was made on the ship *Duras*, 'At and 'from *Marseilles* to *Madeira*, the *Cape*, *Isles of France* 'and *Bourbon*, and to all places in the *East Indies*, from 'place to place, during her stay and trade there, and till 'her return back to *France*, upon any kind of goods and 'also on the ship.'—The plaintiffs were interested in bullion and other goods on board, consigned to their correspondents at *Pondicherry*, with directions to barter or sell the same on their account, and to make the returns to

Plantamour v. *Staples*, M. 22 G. III. B. R. MS. S. C. 1 T. R. 611. n.

An insurance is made on any kind of goods, and on the ship, from *France* to the *East Indies*, and back. The ship being lost in the outward voyage, part of the goods are saved and sent in another ship to *India*, and the produce thereof converted

(a) But see the case of *Henrickson* v. *Margetson*, 2 *East* 549. n. with the observations upon it, sup. 78.

into goods there and sent for *France* in another ship, which being disabled, they are put on board a third ship, which is captured.—The risk continues, and the insurers are liable for the loss.

to *Europe* in other goods, the produce of *India*.—On the outward voyage the *Duras* was lost at the *Isles of France*. Great part of the bullion was saved, and a considerable part of the goods were also saved, but damaged. These, without any authority from the underwriters, were sent forward in another ship to *Pondicherry*, where they were disposed of by the plaintiff's correspondents, who invested the produce in *Indian* goods, and shipped them, on the plaintiffs account, on board the *Pére de Famille*, for *France*.—This ship sailed from *Pondicherry* in *August* 1778; but in her voyage home, was condemned at the *Isles of France*, as unfit to proceed to *Europe*; whereupon the goods were put on board the *Louise*, bound for *France*, which ship was taken by an *English* privateer and condemned. On the 29th of *August* 1778, several underwriters on the policy signed a memorandum thereon, whereby they agreed to run the risk on the goods saved in any other ship or ships till their safe arrival in *France*: But the defendant and several other underwriters refused to sign this agreement.—The defendant paid into court the whole of the average loss occasioned by the loss of the *Duras*. By the loss of the *Louise*, the plaintiffs sustained a loss of 12 *per cent.* on the sum subscribed; which was paid by the underwriters who signed the memorandum, but refused by the rest, and to recover which this action was brought.—The court, upon the above case, were clearly of opinion that the plaintiffs were entitled to recover.—Lord *Mansfield* said,—"The only question is, whether the shipping of the goods to *Europe* was necessary to the salvage. It is admitted that the defendant is liable upon the voyage to *Pondicherry*, *though the goods were conveyed in another ship*; therefore that circumstance makes no difference. The sale of the cargo is also admitted to have been necessary. Then, how were the proceeds to be remitted to *Europe*? What was the best way of getting home the money for the benefit of the insured and insurers? Beyond all doubt the best way was to invest it in other goods. Therefore, that being done which was the best which could be done, the underwriters are liable."—Mr. Justice *Buller* said,—"There

In general when the best is done that can be done for the interest of all parties, the underwriters remain liable.

is

is no case that expressly decides that the captain may invest the produce of the goods saved, in other goods. But in *Mills* v. *Fletcher* (*a*), it was decided that the captain has a general power, and is bound in duty, to do the best for all concerned: And what was done in this case was manifestly for their interest."

If, in the course of the voyage, the ship be disabled, by stress of weather, or any other peril of the sea, the captain ought to hire another vessel for the transport of the goods, and proceed on the voyage, if, under all the circumstances of his situation, it be for the interest of all concerned that he should do so (*b*).

The captain ought to hire another ship, if it be for the interest of all concerned that he do so.

In such case, as the law is understood in *France*, the insurers shall pay all average losses on the goods, the expence of salvage, unloading, warehousing, and reloading, together with all duties that may have been paid,

To what expences the underwriters are liable in such case.

(*a*) *Doug.* 219. inf. c. 13. s. 2.——(*b*) By the *Rhodian* law, (ff. l. 10. s. 1.) the captain is released from all his engagements if the ship, by the perils of the sea, and without any fault on his part, become incapable of proceeding on her voyage. *Vinnius* (p. 295.) says that the captain, in such case, is not obliged to seek another vessel. *Non cogitur aliam quærere navem, quia de certe nave actum est.* The laws of *Oleron*, (art. 4.) and those of *Wisbuy* (art. 16. 37. 55.) say that the captain *may hire* another ship. The law of *France* (ord. mar. tit. *du fret.* art. 11.) declares that if the ship be disabled, and the captain cannot get her repaired, *he shall be obliged to hire another immediately*, if he can procure one.—*Pothier* (*des chartes parties* n. 68.) and *Valin*, (tit. *du fret.* art. 11. vol. 1. p. 618.) say that this means only that the captain is bound to hire another vessel, if he would earn his whole freight. *Emerigon* (vol. 1. p. 428) holds that the captain being the agent, not only of the owners of the ship, but also of the shippers of the goods, is bound, in the absence of both, to use his best endeavours to preserve the goods and to do whatever, in his circumstances, he thinks will most conduce to the interest of all concerned.—In his quality of captain, he has the entire care of the ship and cargo, and is answerable for both. As to the goods, he is bound to do with them what it may be presumed the shippers would do, were they present. This seems to be the wisest and best rule, and that which lord *Mansfield* laid down in the above case of *Plantamour* v. *Staples*, sup. 170.

and the increase of freight, if any. In short, they must bear every expence which is the necessary consequence of changing the ship (*a*).

Sect. III.

Of the Insurance of Goods on board "Ship or Ships."

In policies on goods, the ship is generally specified.

IN the foregoing section it has been shewn, that by specifying the ship or vessel in which the goods insured are to be transported, it becomes a part of the contract that the adventure shall be on board the very ship or vessel so specified; and that no other can be substituted in her place, unless from necessity, or with the consent of the underwriters (*b*).

But they may be insured on board "*any ship or ships.*"

It frequently happens, however, particularly in time of war, that merchants have goods in distant countries, which they mean to import from thence, but know not by what ships they may be sent, and their agents are often glad to avail themselves of the first that offer for that purpose. In such cases, it is of great importance that the owners of such goods should be at liberty to insure them, without specifying the ships or vessels they may be shipped on board of,—and then the form of the policy is, upon such goods, '*on board any ship or ships;*' and this mode of insuring is so well established, both by usage and authority, that the legality of it is now become indisputable (*c*).

If two policies be made, for different sums, on goods in *ship or ships*, and the goods be put on board two ships, and one is lost; the underwriters on both policies shall contribute.

If two insurances, for different sums, be made, each on goods on board *ship or ships*, on behalf of the same person, and for the same voyage; and goods amounting to the value in both policies, but in different proportions, be put on board two ships, which sail on the voyage insured; and nothing be done to appropriate either policy to the goods on board of either ship, and one of them be

(*a*) *Emerig.* tom. 1. p. 432. 576. 681.—— (*b*) Vid. inf. ch. 8. s. 3.— (*c*) Vid. *Kewley* v. *Ryan*, 2 H. Bl. 343. inf. ch. 8. s. 3 *Emerig.* tom. 1. p. 173.

lost;

lost; it would seem that this ought to be considered as but one insurance on the entire goods, by two policies, and that the underwriters on both ought to contribute to the loss.

But otherwise if each policy be appropriated to the goods in a particular ship.

But the following determination will shew that if, in such case, the insured appropriate each policy to certain specific goods on board the respective ships they may happen to be sent by, and one of them be lost, the underwriters on the policy appropriated to the goods on board of that ship, shall be alone answerable.

Henchman v. Offley, M. 23. G. III B. R. MS. S. C. 2 H. Bl. 345. n.

Two policies, the one for 6,000*l.* and the other for 4,000*l.* are made on goods on board *ship or ships*, on the same voyage; and goods to the amount of both policies are put on board two ships, though not in those proportions, but it is declared that one is to be covered by the 6,000*l.* policy.—This ship being lost, the insured shall recover on the 6,000*l.* policy only.

The plaintiff in *India* wrote to his correspondent in *England* to get two insurances effected on his account; one for 6,000*l.* on goods on board *any ship or ships* which should sail from *Bengal* to *London* between the first of *November* 1779, and the first of *July* 1780; the other for 4,000*l.* on goods on board *any ship or ships*, which should sail on the same voyage, between the first of *February* and the 31st of *December* 1780. The two insurances were accordingly effected, and the plaintiff loaded goods to the amount of 4,889*l.* on board the *General Barker*, and to the amount of 4,500*l.* on board the *Ganges*; and entered a certificate before the chief justice in *Bengal*, that he had put such goods on board the one, and such on board the other; and that he had shipped on board the *General Barker* (a) 4,889*l.* of the risk intended to be covered by the 6,000*l.* policy.—Both ships sailed within the time mentioned in the first policy. The *Ganges* arrived safe, but the *General Barker* was lost.—The plaintiff brought an action on the policy for 6,000*l.* which he contended he had a right to apply to the *General Barker*, and went for a total loss.—At the trial two objections were made: 1st. That no evidence could be given of the declaration made by the plaintiff in *India*; 2dly, That there ought to be a contribution, and all the underwriters on both policies called upon as for an average loss; and that the plaintiff ought only to recover in the

(a) In the note of this case in 2 H. Bl. 345, the *Ganges* is here put for the *General Barker*, which is contrary to my note of the case, and obviously contrary to the fact.

proportion

proportion of 4,889*l.* to 4,500*l.*, or, at most, as 4,889*l.* was to 1,111*l.*—Lord *Mansfield*, who tried the cause, over-ruled the objection as to the evidence, and admitted the declaration in *Bengal* to be read, and was of opinion that by it the plaintiff had fixed the application of the 6,000*l.* policy entirely to the *General Barker*, and a verdict was found accordingly.—Upon a motion for a new trial, the court held that plaintiff had a right to apply the 6,000*l.* policy to the *General Barker*; but ordered 1,111*l.* to be deducted out of the 6,000*l.* for what had been saved.—The plaintiff therefore recovered 4,889*l.* the value of the goods put on board that ship.

A declaration made before a magistrate in *India*, that a particular cargo shall be covered by a particular policy, may be read in evidence here.

So, if two distinct insurances be made on goods for the same person, and the same voyage; the one on board a specific ship, the other on board *any ship or ships*; and the former arrive safe, but the latter is lost: the insured shall apply the policy on the goods on board *ship or ships* to the goods lost.

If two policies on goods be made the one on board a particular ship, and the other in *ship or ships*; and the latter be lost, the latter policy shall be applied to the goods lost. *Kewley* v. *Ryan*, 2 H. Bl. 343.

Thus:—*Freeland* and *Rigby* at *St. Vincents* wrote to the plaintiffs at *Liverpool*, to get 1,260*l.* insured on 70 bales of cotton, *on board the Elizabeth*, from *Grenada* to *England*; and also 1,300*l.* on cotton which they intended to send by *some other ship* that would sail by the first convoy, and directed this to be insured by *ship or ships*.—The plaintiff accordingly got 1,260*l.* insured in *London*, on goods on board the *Elizabeth*; and also 1,300*l.* on goods on board *ship or ships*, viz. 700*l.* at *Liverpool*, and 600*l.* in *London*. The policy for 700*l.* on which this action was brought, was, 'At and from *Grenada* to *Liverpool*, 'on any kind of goods as interest should appear, in '*ship or ships*, on account of *Freeland* and *Rigby*, war'ranted to sail on or before the 1st of *August* 1793, and 'return 3 *per cent.* if the ship sailed with convoy, and 'arrived; without any exception of the goods on board 'the *Elizabeth*.' The policy for 600*l.* effected in *London*, was also *on ship or ships*; at and from *Grenada* to *Liverpool*, but with an exception of 1,260*l.* 'on 70 bales 'of cotton *per Elizabeth*,' the sam underwriters in *London* having before subscribed the policy on the *Elizabeth*. But the plaintiff did not communicate to the underwriters at *Liverpool*, the letter of *Freeland* and *Rigby* di-

recting an insurance on the *Elizabeth*, nor any circumstance respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship.—The *Elizabeth* arrived safe at *Liverpool*. The *Heart of Oak*, on board of which the second cargo was shipped, was totally lost in the voyage.—The defendant conceiving that he had a right to apply the policy for 700*l.* *on ship or ships*, to the goods on board the *Elizabeth*, paid 3 *per cent.* into court on account of her having sailed with convoy and arrived.—The plaintiff recovered a verdict for the full amount of the defendant's subscription, including the money paid into court.—Upon a motion for a new trial, it was contended, on the part of the defendant, *first*, that a policy on *ship or ships* was not a legal policy; and *secondly*, that, as a ship answering the description in the policy, arrived safe, having the full amount of the sum insured, the property of *Freeland* and *Rigby*, on board, the policy was satisfied: And as every circumstance respecting the specific insurance on the *Elizabeth* had been concealed from the defendant, it was the same, with regard to him, as if no such insurance had been made on that ship. For if the *Elizabeth* had been lost and the *Heart of Oak* had arrived safe, the policy might, by suppressing the letter from *Freeland* and *Rigby*, have charged the defendant with that loss.—But the court were unanimously of opinion, *first*, that the legality of the policy on *ship or ships*, was too well established, both by usage and authority, to be disputed; and *secondly*, that the insured had clearly a right to apply, upon the authority of the foregoing case of *Henchman* v. *Offley*, such an insurance to whatever ship he thought proper within the terms of it.

By the law of *France*, if an insurance be made *separately* on goods on board several ships, named, and the whole are laden on board one ship; the insurer will run only the risk on the sum which he had insured on board that one ship, although all the ships are lost; and he shall return the premium on all but that one, deducting one half *per cent.* (*a*).

(*a*) Vid. ord. mar. h. t. art. 32. *Valin* ib. *Pothier*, h. t. n. 68. *Le Guidon*, ch. 1[illegible]. *Emerig.* tom. 1. p. 176.

Emerigon

If a certain sum be insured on goods on board *ship or ships*: and goods to a much larger amount be put on board several ships, of which some are lost; Q. what proportion of the loss the insurers shall bear.

Emerigon (*a*) reports the following decision on this subject.—An insurance for 13,000 *livres* was made on goods on board the *Amphitrite*, from *Marseilles* to the *French West India Islands*, and from the *French West India Islands* to *Marseilles* or other ports in *France*; upon goods and merchandizes to be laden on board "*any* "*French ship or ships*" (*b*).—The *Amphitrite* arrived safe in the *West Indies*, where the captain loaded goods on board five different ships, in different quantities, to the amount of 25,832 *livres*. Three of the ships arrived safe, but the other two, with goods on board to the value of 15,259 *livres*, were taken by the *English*.—The insured insisted that the 13,000 *livres* insured should be considered as part of the 25,832 *livres* laden on board the five ships, and that the insurers should be condemned to pay the loss, by the rule of proportion, upon the total.—The insurers insisted that the value of the goods which arrived safe was more than the sum insured; and therefore the policy was satisfied. The insured replied, that the goods on board the five ships formed one entire mass, consisting of what was insured, and what was not covered by the policy, and therefore the insurers should pay the loss by the rule of proportion.—The insurers were condemned to pay 54 *per cent.* on the sum insured; but upon what principle is not stated:—The proportion which 15,259 bear to 25,832 is nearly 59 *per cent.*: So that, if the rule insisted upon by the insured was meant to be adopted by the court, there must have been a miscalculation in fixing the loss at 54 *per cent.*, unless we suppose that in the 59 *per cent.* the costs and expences were included.

If goods be insured on board of several ships, by seperate policies, the risk to begin from the goods leaving the shore, and the goods are all sent in one vessel to be put on board the several ships, and this vessel be lost; Q. to what extent the insurers are liable.

Le Guidon (*c*) puts this case.—A merchant intending to export a quantity of goods in several ships, makes an insurance on each, and sends the whole in a vessel from *Rouen* to *Havre*, to be put on board the different ships, and this vessel is lost in its passage.—The question he makes is, whether the words in the policy, "*courront* "*risque en barques, heus, ou bateaux, qui porteront les dites*

(*a*) Tom. 1. p. 174. —— (*b*) *In quovis, dan un ou plusieurs bâtimens Francois, quels qu'ils puissent être.* —— (*c*) Ch. 13. art. 1.

 "*marchandises*

" *marchandises à bord,*" ſhall bind the inſurers to pay the ſeveral ſums inſured on each ſhip.—He thinks the inſurers liable only for the greateſt ſum inſured on any one of the ſhips.—*Valin* (*a*) is not of that opinion. " It is ſufficient," ſays he, " that it was intended to divide the goods amongſt the different ſhips, according to the terms of the inſurance, to make the loſs fall on the inſurers; for they muſt at length be carried on board each of the ſhips; and their being put on board a ſingle bark is of little conſequence."—*Emerigon* (*b*) on the contrary, thinks that it is of great conſequence to the inſurer, who has taken upon him the riſk of the goods on board ſeveral veſſels, that they ſhould not be confined to one; and that neither the inſured nor his captain has a right to make the condition of the inſurer more perilous, by uniting all the riſks into one, which, by the contract, ought to be divided. He concludes, however, by obſerving, that if ever the caſe ſhould happen, *Valin*'s opinion ought to be followed.

Sect. IV.

Of the Employment and Conduct of the Ship.

The ſhip muſt be employed and navigated according to law.

ANOTHER implied condition relative to the ſhip is, that ſhe ſhall be employed, navigated, and conducted, according to law; that is, not only according to the municipal law, and the law of nations, but alſo according to the particular treaties ſubſiſting between the country to which ſhe belongs and other ſtates (*c*).

The captain muſt be under no legal diſability.

The ſhip muſt, therefore, not only be employed in a legal trade, but ſhe muſt carry it on in a legal manner. If the captain be under any legal diſability or diſqualification, the ſhip ſhall not be deemed to be navigated

(*a*) Sur. art. 32. h. t. p. 79.——(*b*) Tom. 1. p. 177, 178. ——(*c*) Vid. Lord *Kenyon*'s judgment in *Chriſtie* v. *Secretan*, 8 T. R. 192.

according to law; and an insurance on such ship will be void.

Therefore, a non-compliance with a regulation as to the qualification of the master, though subjecting both master and owners to penalties, will avoid the policy.

Thus; the late statute for regulating the slave trade (*a*), required that the master of any ship at the time of clearing out in the *African* slave trade, should make oath, and deliver to the collector of the customs of the port, a certificate attested *by the respective owner or owners*, that he had served as master during one voyage, or as chief mate or surgeon during two voyages, or as chief or other mate during three voyages, in the slave trade, to be attested by the owner or owners of the ship or ships in which such service was performed; upon pain that the master, and also the owners who employ him, should for every such offence respectively forfeit 500*l*.

Farmer v. Legg, 7 T. R. 186.

—Upon the construction of this act it was determined, that a certificate from the owners in the *intended voyage* was not sufficient evidence of a compliance with the directions of the act; and that, though a heavy penalty is imposed, not only on the master who serves as such, without the qualification prescribed, but also on the owners for employing him; and though the act does not declare that, for the omission, the insurance on the ship shall be void, yet it has been holden that the certificate ought to have been from the owners of the ship *in which the service was performed*; and that for the want of this, the ship could not be deemed to have been legally navigated, and, therefore, that a policy upon her was void.

The ship must be navigated according to subsisting treaties.

The ship insured must, as has already been observed, be navigated according to the subsisting treaties between the state to which she belongs and other states; and she is bound, therefore, to be provided with all such documents and papers as are required by such treaties (*b*). Therefore the sentence of a foreign

Though a sentence, on the express ground that the ship had violated a treaty, be conclusive; yet, if this be only *recited as a fact*, and the ground of the sentence be that the ship was *enemy's property*, the sentence will not be conclusive.

(*a*) Stat. 31 G. III. c. 54. s. 7. originally to be in force only for a year; but annually continued afterwards down to the final abolition of the slave trade.——(*b*) See the judgments of Lord *Kenyon* and Mr. Justice *Lawrence*, in *Christie v. Secretan*, 8 T. R. 196.

court

court of admiralty, condemning a ſhip as prize upon the expreſs ground that ſhe had violated a treaty ſubſiſting between the country to which ſhe belonged, and the belligerent by which ſhe was captured, is concluſive evidence to prove that ſhe had not failed according to law, and ſo to diſcharge the underwriters. But if a neutral ſhip be condemned, *as being enemy's property*, and one of the reaſons aſſigned for this in the ſentence be, that ſhe had not the proper documents required by treaty on board; this ſhall not be concluſive evidence to prove that ſhe had not failed according to law; for the only point which the ſentence profeſſes to *decide* is, that ſhe was enemy's property (*a*).

And thus much for what relates to the ſhip or veſſel that is to perform the voyage inſured.

(*a*) R. *Chriſtie* v. *Secretan*, 8 T. R 192 inf ch. 9. ſ. 5. And yet the adjudication muſt be ſuppoſed to be the neceſſary conſequence of the facts found; and the facts recited in the ſentence muſt have been found by the court, otherwiſe the ſentence would have been without foundation, a concluſion without premiſes.

CHAP. VI.

Of the Voyage.

THE next subject which demands our attention is the voyage upon which the insurance is to be made: Under this head we will consider;

I. *When the illegality of the Voyage shall avoid the Contract;*
II. *What shall be a Deviation from the Voyage that will discharge the Underwriters;*
III. *When a Deviation shall be justified by Necessity.*

Sect. I.

When the Illegality of the Voyage shall avoid the Contract.

What is meant by the voyage.

By the voyage, is here meant, the passage of a ship upon the seas, from one port to another, or to several ports. The voyage, with reference to the *legality* of it, is sometimes confounded with the *traffic* in which the ship is engaged, and is frequently said to be illegal, only because the trade is so (*a*). But a voyage may be lawful, and yet the transport of certain goods on board the ship may be prohibited; or the voyage may be illegal, though the transport of the goods be lawful. It has therefore been thought proper to distinguish the voyage

(*a*) When the contract is void on account of the illegality of the commerce, vid. sup. ch. 3. s. 1, 2, 3, 4, 5.

from

from the commerce carried on by it, with reference to the legality or illegality of each; and as the ſubject of inſurances upon illegal commerce has been already conſidered in its proper place (*a*), it will be our principal buſineſs, in this chapter, to ſhew, what voyages are in themſelves unlawful; and in what reſpect the illegality of a voyage affects inſurances upon the ſhip or the goods on board.

General rule.

Upon this ſubject, as upon that of illegal commerce, it may be laid down as a general rule, that no inſurance can be legally made upon any voyage undertaken contrary to the laws of this kingdom, or thoſe of its dependencies, or to the law of nations. And it is immaterial whether the inſurer was or was not informed, that the voyage was illegal. The law would be inconſiſtent with itſelf, were it to lend its aid to enforce the performance of a contract, made in contravention of its own regulations (*b*).

An inſurance, therefore, upon any ſhip or goods for a voyage undertaken contrary to the laws made for the encouragement and increaſe of the ſhipping and navigation of this country, is void (*c*).

An inſurance upon a voyage prohibited by the laws made for the protection of the monopoly of the *Eaſt India* company, is void.

The laws made for ſecuring to the *India* company the monopoly of the trade to the *Eaſt Indies*, prohibit the ſhips of any other *Britiſh* ſubjects from ſailing beyond the *Cape of Good Hope*, without a licence from the company, and alſo prohibit the exportation of the goods of *Britiſh* ſubjects, in foreign ſhips, to the *Eaſt Indies*. Any inſurance, therefore, of ſhip or goods, for a voyage undertaken in contravention of theſe laws, is void.—Indeed the excluſive trade of the company is ſo interwoven with the general intereſts of the ſtate, that it is not now to be conſidered ſo much the private right of a particular corporation, as that of a great national concern, the infringement of which is a public miſchief, and a public wrong, and as ſuch, is prohibited by the common law (*d*).

(*a*) Sup. ch. 3. ſ. 1, 2.——(*b*) Vid. *Bynk.* quæſt. jur. pub. lib. 1. c. 21. *Roccus,* h. t. n. 21. ſeems to entertain a contrary opinion.——(*c*) Vid. ſup. 55, 62.——(*d*) Vid. *Camden* v. *Anderſon,* 1 *Boſ.* and *Pul.* 272.

Though the *penalties* of the 9 & 10 W. III. c. 44 have been repealed by the 33 G. III c. 52.; yet a policy on a voyage undertaken in contravention of the former act is void.

In treating on the subject of insurances on illegal commerce, it has been shewn (*a*) that though, since the stat. 9 and 10 *W*. III. c. 52. many acts of parliament have been made, from time to time, for the regulation of the *East India* trade, and for the more effectually securing the monopoly of that trade to the company, yet that act has never been wholly put an end to. And though such parts of it as inflicted penalties, &c. have been repealed by the stat. 33 *G*. III c. 52.; and though this last act has provided that no acts, or parts of acts, thereby repealed, shall be pleaded or set up in bar of any action, &c.; yet it is competent to the underwriters who have subscribed a policy on a ship trading to the *East Indies* in contravention of the stat. 9 and 10 *W*. 3., to avail themselves of this illegality of the voyage, in defence to an action on such policy. This was determined in the case of *Camden* v. *Anderson* already cited on the subject of illegal commerce (*b*). It needs scarcely to be added, that the same principle upon which the insurance in that case was held to be void, is equally applicable to an insurance upon a *voyage* undertaken in contravention of the laws above referred to.

Under the treaty allowing the *Americans* to trade to the *British* settlements in *India*, it is not necessary that this trade should be carried on between *America* and *India*, *directly*, but may be carried on *circuitously*, by the way of *Europe*.

By the treaty between *Great Britain* and the *United States* of *America*, concluded in the year 1795, and confirmed by the stat. 37 *G*. III. c. 97., it is agreed,—'That 'the citizens of the *United States* shall be received into 'the ports and harbours of the *British* territories in the '*East Indies*, and may freely carry on trade between the 'said territories and the *United States*, in all articles of 'which the exportation or importation to or from the 'said territories shall not be entirely prohibited.'—It then adds several regulations under which this trade may be carried on, one of which is,—'That the vessels of the '*United States* shall not carry on any part of the coasting 'trade of the said territories; but vessels going with 'their original cargoes from one port of discharge to 'another, are not to be considered as carrying on the 'coasting trade.'—From the following case it will appear, that,

(*a*) Sup. c. 3. s. 1, 2.——(*b*) Vid. sup. 65.

that, under this treaty, it is not neceſſary that this trade ſhould be carried on from *America* to the *Britiſh* ſettlements in the *Eaſt Indies direct*; but that it may be carried on *circuitouſly* by the way of *Europe*.—As where an *American* ſhip the property of A. and B. (both *Britiſh* born ſubjects, but naturalized in *America*, A. before, and B. who was captain, after the declaration of independence) ſailed to *France* with a cargo of goods, there diſpoſed of them, and purchaſed goods for *India*, ſailed to *Madeira*, where ſhe took in the remainder of her cargo, conſiſting of *Engliſh* and *Portugueſe* productions, and proceeded on her voyage to the *Britiſh* ſettlements in the *Eaſt Indies* for the purpoſe of trading there.—It was determined that this voyage was legal, and an inſurance upon it valid; though the trade was not direct between *America* and *India*, but circuitous by the way of *Europe*; and though, as far as related to the *Britiſh* goods, this was a trading from *Great Britain* to *India* without a licence, by B., who was ſtill a *Britiſh* ſubject; for it was holden that a natural born ſubject of *Great Britain* may become a citizen of the *United States* for the purpoſes of commerce, and ſhall be entitled to all the advantages of an *American* under this treaty; and his coming into this country for a temporary purpoſe does not deprive him of thoſe advantages.

Wilſon v. *Marriat*, 8 T. R. 31. ſup. 68.

A *Britiſh* ſubject may, by naturalization, become an *American* citizen for the purpoſes of commerce.

Sect. II.

What ſhall be a Deviation from the Voyage.

BY deviation is here meant a voluntary departure, without neceſſity, from the uſual courſe of the voyage inſured. From the moment this happens the voyage is changed, the contract determined, and the inſurer diſcharged from all ſubſequent reſponſibility. By the terms of the contract, the inſurer only runs the riſk of the voyage agreed upon, and of no other; and it is therefore a condition neceſſarily implied in the policy, that the ſhip ſhall proceed to her port of deſtination by the ſhorteſt

Deviation defined.

and safest course; and on no account deviate from that course, but in cases of necessity (*a*).

Distinction between an intended deviation and a different voyage.

A deviation is generally the result of after-thoughts, after-interest, after-temptation; and not of any previous deliberate intention: For it is not easy to conceive that any man, at all conversant in business, would be so, foolish as to intend, *before hand*, to deviate from the voyage described in the policy; because that would be, to pay for an indemnity without having it. When the insured intends a deviation from the direct or usual course of the voyage proposed, it is always provided for, and the policy is adapted to it, unless fraud be intended (*b*); and in every case the *terminus à quo* and the *terminus ad quem* of the voyage described in the policy, and of the voyage intended, must be precisely the same. For if the voyage specified in the policy be not the voyage intended, and the insured, meaning to send the ship on a different voyage, give the captain his instructions accordingly; this is not the case of an *intended deviation*, for there cannot be a deviation from a voyage which was never in the contemplation of the insured: It must be considered as a different voyage from that described in the policy (*c*).

Effect of a deviation.

The effect of a deviation is not to vitiate or avoid the policy, but only to determine the liability of the underwriters from the time of the deviation. If, therefore, a ship or goods after the voyage has commenced, receive damage, then the ship deviates, and afterwards a loss happen; there, though the insurer is discharged from the time of the deviation, and is not answerable for the subsequent loss, yet he is bound to make good the damage sustained previous to the deviation (*d*). But though he be thus discharged from subsequent responsibility, he

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(*a*) *Periculum intelligitur solum currere assecurator, pro illo itinere convento, et non pro alio. Nam si navis mutuverit iter, vel à viâ rectâ illius itineris diverterit, non tenetur amplius assecurator. Roccus*, n. 52.——(*b* Vid. *Doug.* 278.——(*c*) See the opinions of lord *Mansfield* and Mr. Justice *Buller*, in *Wooldridge* v. *Boydell*, *Doug.* 18. inf. ch. 8. s. 3. and the opinion of lord *Kenyon* in *Stott* v. *Vaughan*, inf.—See, however, *Kewley* v. *Ryan*, 2 H. Bl. 343. inf.——(*d*) Per *Holt*, C. J. in *Green* v. *Young*, at N. P. 2 Lord *Ray*. 842. 2 *Salk*. 444.

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is entitled to retain the whole premium.—The reason why a deviation discharges the insurer, is not that the risk is thereby increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk (*a*).

Why it discharges the underwriters.

A person unacquainted with the nature of this contract, might, at first view, be tempted to think that if, after a deviation, the ship resume her proper course, still being in a good condition and capable of performing the remainder of the voyage, such a deviation ought not to alter the rights of the parties, or deprive the insured of the benefit of his policy.—But the answer is, that the condition implied in the contract, viz. that the ship shall not deviate without necessity, being broken by the insured, the insurer is discharged; and that the proper course of the voyage being once interrupted, cannot be resumed in the eye of the law: The contract being once dissolved cannot be renewed without the consent of both the parties; and if a loss happen after a deviation, who can say that the ship would not have arrived safe if she had pursued the usual course.

It determines the contract though the ship resume her proper course.

Having premised thus much concerning deviation in general, we will now proceed to consider this subject under the two following sub-divisions; 1. *What shall amount to a deviation.*—2. *When a deviation shall be justified by necessity.*

1. *What shall amount to a Deviation.*

A deviation has been defined, a voluntary departure, without necessity, from the usual course of the voyage. By the course of the voyage is not meant the shortest course the ship can take from her port of departure to her port of destination; but the regular and customary track, if such there be, which long usage has proved to be the safest and most convenient. Therefore the stopping

What is meant by the usual course of the voyage.

Stopping at certain places is no deviation if it be customary to do so.

(*a*) See lord *Mansfield*'s judgment in *Lavabre* v. *Wilson*, *Doug.* 271. inf. 192. and in *Hartley* v. *Buggins*, inf.

ping at certain places in the course of the voyage, though out of the direct line, if it have been customary to do so, is not a deviation, but a part of the voyage: For, whatever is usually done, is presumed to be foreseen, and to be in the contemplation of the parties in making the contract, and is therefore understood to be referred to by every policy, and to make a part of it as much as if it were expressed (*a*).

But a few instances will not make a usage.

But evidence of a few instances is not sufficient to establish such a usage. It can only be supported by long and uniform practice. Therefore, if a ship, in a voyage from *Liverpool* to *Jamaica*, put into the *Isle of Man*; and some instances appear of ships in this voyage putting in there, but no regular or settled practice of doing so be shewn; this will not excuse the deviation, but the insurers will be discharged (*b*).

The extent of the deviation does not vary its effect.

The shortness of the time, or of the distance, of a deviation, makes no difference as to its effect on the contract. Whether it be for an hour or a month, or for one mile or one hundred, the consequence is the same. If it be voluntary, and without necessity, it puts an end to the responsibility of the insurer; for it is not the increase of the risk, but the substitution of another risk for it, that determines the contract (*c*).

Fox v. *Black*, at N. P. 1757, *Beawes* 315.

Therefore where a vessel insured from *Dartmouth* to *Liverpool*, put into *Loo*, a place she must of necessity pass by in the course of the voyage insured.—Though no accident befel the vessel in going into or coming out of *Loo*, but she was lost after she got to sea again, Mr. Justice *Yates* held that this was a fatal deviation.

Townson v. *Guyon*, at N. P. *Beawes* 315

S. P.

So where goods were insured from *Dunkirk* to *Leghorn*, and the ship came to *Dover*, in her way, to procure a *Mediterranean* pass, and was afterwards lost,—Lord *Mansfield*, in an action on the policy, held that the calling at *Dover* was a deviation which discharged the underwriters.

(*a*) Per lord *Mansfield* in *Pelly* v. *Roy. Ex. Assur.* 1 *Bur.* 348, inf. ch. 7. s. 5.—(*b*) Vid. *Bond* v. *Nutt*, *Cowp.* 601. inf. ch. 9. s. 3.——(*c*) See *Lavabre* v. *Wilson*, inf. ch. 7. s. 3.

So,

So, where an insurance on goods was made at *Glasgow*, 'from *Carron* to *Hull*; with Liberty to call at *Leith*.'—The instructions to the broker directed him to make the insurance, '*with liberty to call as usual*;' and it was usual for vessels sailing from *Carron* with goods on freight for *Hull*, in going down the *Frith* of *Forth*, to touch at different places for the purpose of taking in and delivering goods; particularly at *Burrowstowness* and *Leith*, and at *Morrison's Haven*, six miles down the *Frith*, on the same side with *Leith*. The insured were not privy to the liberty "*to call at Leith*," being substituted in the policy for the more general liberty, "*to call as usual*." The premium was equal, if not higher than was usual where the general liberty to touch at the customary ports was allowed. The ship sailed on the 4th of *February* 1774, did not touch at *Leith*, *but put into Morrison's Haven*; sailed from thence on the 9th, got safe into the direct course from *Carron* to *Hull*, and proceeded with a fair wind, till the 10th, when she was overtaken by a storm, wrecked on the coast of *Northumberland*, and the cargo totally lost.—The underwriters, on hearing of the loss, conceiving themselves liable, wrote orders to have the goods preserved and sent to *Hull*, promising to contribute towards the expence as far as they were interested. Afterwards, however, they protested against the ship's having gone into *Morrison's Haven*, as being a deviation, and refused payment of the loss.—An action was brought by the insured in *Scotland*, and, after a variety of proceedings in the courts there, which would neither be very intelligible, or very instructive, to an *English* reader, the underwriters were decreed to pay the loss.—But upon appeal, to the House of Lords, that judgment was reversed, the House being of opinion that there was, in this case, a wilful deviation; and though ships sailing on this voyage have sometimes been permitted, by the terms of the policies underwritten at the same premium, to go into *Morrison's Haven*, yet that could not avail in the present case, since here no permission was given; that a wilful deviation from the due course of the voyage insured is, in all cases, a determination of the policy; and, that it

Elliot v. Wilson, 7 *Bro.* Parl. Ca. 459.

A ship, having liberty to put into one port, puts into another equally in her way: This is fatal, though neither the risk nor premium would have been greater, if this had been permitted by the policy.

is immaterial from what cause, or at what place, a subsequent loss happens; for, from the moment of the deviation the underwriters are discharged.

Where a ship has liberty to touch and stay at a place in the course of the voyage, she must confine herself strictly to the terms of the liberty so given. Any attempt to trade, therefore, during her stay there, as by shipping or landing goods, will amount to a species of deviation, and discharge the underwriters, unless the ship have liberty *to trade* as well as to touch and stay at such place (*a*).

Stitt v. *Wardell*, 1 *Esp.* N. P. Rep. 610.

A liberty to *touch and stay* does not authorise the insured to break *bulk or trade.*

Thus:—A ship was insured, 'at and from *Whitehaven* 'to *St. Michael's*, and from thence to her port or ports 'of discharge in the *Channel*, with liberty to touch and 'stay *at any port or ports in her passage out.*'—The ship, by stress of weather, was forced to put into the port of *Dublin*, where she continued three weeks, and there broke bulk and sold a quantity of coals with which she was partly freighted.—Upon this coming out in evidence upon the trial, Lord *Kenyon* said that the plaintiff could not recover under this policy, because the liberty to touch and stay at any port could never be extended to give the insured a liberty of *trading* at such port; for that would be to make the underwriters insure a voyage which was not in their contemplation.

A liberty to touch and *discharge* goods will not warrant the *taking in* of a new cargo.

And the rule in this respect is so strict, that a liberty to touch and *discharge* goods at a place will not warrant the captain in taking in a new cargo there, even while the ship is detained by contrary winds; for this would be a new adventure not within the terms of the policy.

Sheriff v *Potts*, 5 *Esp.* N. P. Rep. 96.

As where a ship was insured, 'At and from *Guernsey* 'to *Gibraltar*, with liberty to touch and *discharge* goods 'at *Lisbon*; to return part of the premium if the ship 'sailed with convoy from thence for *Gibraltar*.'—It appeared that while the ship was at *Lisbon* waiting for convoy, she did not only discharge part of her cargo,

(*a*) Yet, if a ship be found to be too heavily laden, she may put into a port, land part of her cargo, and sell it; or if too light, she may take in ballast, or goods instead of ballast. See *Guibert* v. *Redshaw*, inf. s. 3.

but

but took in goods there for *Gibraltar*, upon which it was objected that this discharged the underwriters.—On the part of the plaintiff, it was contended that this being done while the ship was necessarily waiting for convoy, occasioned no delay.—But Lord *Ellenborough*, who tried the cause, held that it amounted to a deviation, and consequently discharged the underwriters.—He said, that a liberty to discharge part of the cargo, afforded no authority to take in a new cargo; for, if that were permitted, a ship detained by contrary winds might take in a new cargo, and engage in a new adventure, which was not within the policy (*a*).

If there be several ports of discharge, the ship must visit them in their order.

If there be several ports of discharge mentioned in the policy, the ship must not invert the order of these places as they stand in the policy, but must go to them in the order in which they are named, unless some usage or particular necessity intervene to vary the general rule.

Unless there be an usage to the contrary.

Beatson v. Haworth, 6 T. R. 531.

A ship is insured from *A.* to *B.* and from thence to *C.* and *D.* the ports of discharge. The ship goes to *D.* before *C.*: This is a deviation.

Thus:—An insurance was made on a ship, 'At and 'from *Fisherow* to *Gothenburgh*, and back to *Leith* and '*Cockenzie*;'—The ship performed her voyage outward to *Gothenburgh*, and having taken in goods both for *Leith* and *Cockenzie*, on her return home, without going to *Leith*, she first put into *Cockenzie*, where she was stranded and lost.—In an action on the policy, evidence was given to shew, that *Leith* was a very safe and commodious harbour, and *Cockenzie* a very small and insecure one, especially in the winter; that the two places are about ten miles from each other; but *Cockenzie* lies nearest to *Gothenburgh*, and it is about a mile and a half out of the way to put into *Cockenzie*, in going from *Gothenburgh* to *Leith*; that, though there was no settled course to regulate this voyage, yet it was safest to go first to *Leith*; for, by discharging the lading for *Leith*, the risk of going into *Cockenzie* was much lessened.—Upon this case, the court determined, that as the intended voyage was described in the policy, and as there was no regular and settled course, known to all the traders, different from that so described, the ship deviated by putting into *Cockenzie*

(*a*) See *Grant* v. *Paxton*, inf. ch. 7. s. 5.

first,

first, and consequently that the plaintiff could not recover.—One of the judges added, that the parties, by inserting the names of the places contrary to the natural order in which they lay in the ship's course, shewed it to be their *intention* to vary the natural course of the voyage.

The ship may sail for any one of the places; but if she visit more than one, she must take them in their order.

But if goods be insured from A. to B., C., and D.; and the goods are shipped and cleared out for D only; and a loss happen before the ship arrives at the dividing point from which she would have sailed directly for D., the underwriters are liable (*a*)—This, however, is not a question of deviation, but merely whether the ship, at her departure, sailed on the voyage described in the policy. The voyage insured meant a voyage to all or any of the places named, subject, however, to this restriction, that if the ship should go to more than one of the places, she must visit them in the order in which they stand in the policy.

Though the ports of discharge be not particularly specified, yet they must be taken in their geographical order.

If the ship's ports of discharge are only mentioned generally, but not specifically named in the policy, the ship must go to them in the *geographical* order in which they occur; and taking them out of that order, unless this be warranted by usage, will be a deviation.

Clason v. Simmonds, at N P. cited by Mr. Justice *Lawrence*, 6 T. R. 533.

A ship is insured from *London* to her ports of discharge in the *Streights*, with liberty to stop at any places whatsoever; and she goes first to *Genoa*, then to *Leghorn*, and lastly to *Marseilles*:—The voyage ends at *Leghorn*, and the insurers are discharged.

Thus:—An insurance was made on goods, 'At and 'from *London* to the ship's ports of discharge in the '*Streights* as high as *Messina*; with power to stop or stay 'at any ports or places whatsoever.'—The ship was freighted with lead from *London* to *Marseilles*, and went into *Falmouth*, where she staid three weeks, and took in a freight of tin for the same place. Before she went from *London*, the plaintiff, who was owner of the ship, declared that she was to go directly to *Genoa*, *Leghorn*, and *Naples*, and there was nothing said about *Marseilles*. When she was off *Marseilles*, the wind being against her, she could not then get in, but went to *Genoa*, and from thence to *Leghorn*, and in coming back to *Marseilles*, she was attacked by a privateer, and blown up.—In an action on the policy, it was proved by several captains, and so

(*a*) *R. Marsden v. Reid*, 3 *East* 572. inf. ch. 8. s. 3.

held

held by lord Chief Justice *Lee*, 1st, That the going into *Falmouth* and staying there, was a deviation; 2dly, That as she did not stop at *Marseilles*, this was acting contrary to the terms of the policy; for by her ports of discharge must be understood, the ports at which it was intended goods should be delivered, and the first of them was *Marseilles*.—Upon this there was a verdict for the defendant,

Hogg v. Horner, at N. P. after Mich. 1797. MS.

So, where a ship was insured, 'At and from *Lisbon* to 'a port in *England*, with liberty to call *at any one port* '*in Portugal*, for any purpose whatsoever.'—The ship sailed from *Lisbon* to *Faro*, to complete her loading, *Faro* being a port in *Portugal*, to the southward of *Lisbon*, and therefore quite out of the course of the voyage to *England*.—Lord *Kenyon* held that the liberty given by the policy to call at any one port in *Portugal*, must be restrained to a permission to call at some port to the northward of *Lisbon*, in the course of the voyage to *England*; and that going to the southward was a deviation which discharged the underwriters.

A ship is insured from *Lisbon* to *England*, with liberty to call *at any one port in Portugal*: This gives only a liberty to call at some port in *Portugal* in the course of the voyage to *England*.

Bristol v. Bowil, 1 Bos. & Pul. 313. sup. 190.

Yet, if a ship be compelled by any necessity to change the order of the places to which she is insured, this is no deviation.—As where a ship was insured from *Lisbon* to *Madeira*, from thence to *Saffi*, on the coast of *Africa*, and back from thence to *Lisbon*; and upon her arrival at *Madeira*, the crew being alarmed by reports of *Moorish* cruisers being off *Saffi*, quitted the ship and refused to return to her unless the captain would promise to sail immediately back to *Lisbon*. The captain complied; but on his arrival at *Lisbon*, the charterers insisted on his proceeding directly to *Saffi*; which he accordingly did, and was captured on his return from *Saffi* to *Lisbon*.—It was determined, that there was no deviation in this case, and that the underwriters were liable.

Yet if a ship be compelled by necessity to alter the order of the places, it will be no deviation.

As the clause so frequently introduced into policies, giving liberty to the insured '*to touch, stay, trade, &c. at* '*any ports or places*,' in the course of the voyage, is often inserted as a matter of course, and without much consideration, it is necessary that it should be understood with such restrictions as the courts in different countries have thought necessary to impose on it, in order to prevent

The clause giving liberty *to touch, stay, trade, &c.* must always be interpreted as subordinate to the voyage insured.

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vent any unfair advantage being taken of the general words in which it is ufually expreffed. It is therefore always interpreted as fubordinate to the voyage infured, which is the principal object of the contract; and in cafes of doubt, it muft be underftood with reference to the laws of commerce and the ufuage of the particular trade. If, therefore, there be in the policy a liberty, '*to touch, ftay, and trade at any ports and places in the voy-* '*age*;' fuch a liberty, however general the words may be, does not give the captain a power to change the regular courfe of the voyage infured, which he muft keep conftantly in view: It only extends to the ports and places in the ufual and ordinary courfe of the voyage (*a*).

And however general, it gives no power to *change the voyage*, but only to extend it to places *in the ufual courfe of the voyage.*

Lavabre v. *Wilfon* and *Lavabre* v. *Watfon*, *Doug.* 271.

A fhip is infured from *France* to *Pondicherry* and *China*, and back to *France*; with liberty *to touch and ftay at any ports and places*, &c. This will not cover a voyage to *Bengal*.—A liberty to touch and ftay at any ports and places means, ports and places *in the ufual courfe of the voyage.*

Thus:—An infurance was made, "At and from *Port* "*L'Orient* to *Pondicherry*, *Madras*, and *China*; and at "and from thence back to the fhip's port or ports of dif- "charge in *France*; with liberty to touch in the *outward*

(*a*) *Cafaregis*, (difc. 67. n. 25.) obferving that the captain in the exercife of this liberty ought never to lofe fight of the voyage infured, fays, "*Clarum eft verba apodixiæ fecuritatis committere voluntati patroni totum itineris decurfum; ita ut in ejus arbitrio regulato tamen à jure et ratione, repofitum fit quafcumque fcalas, quofcumque portus ingredi, antecedere in viâ, & retrocedere pro ut exigunt neceffitas et opportunitas, fed femper animo, et intentione profequendi VIAGGIUM ufque ad finem deftinatam.*"—The fame doctrine is laid down by *Emerigon* (tom 2. p. 32. & feq.), and he exemplifies it by the following cafes.—1. An infurance was made on a voyage from *Marfeilles* to the *Levant* and back, with liberty to the captain, "*de toucher et retrogader par-tout ou il lui plairoit.*" The fhip failed to *Cadiz*, where fhe was loft.—It was determined that the liberty given by the above claufe was fubordinate to the voyage mentioned in the policy; but that here the voyage was changed, and the infurers difcharged.—2. A voyage was infured from *Leghorn* to *Havre de Grace*, with liberty "*de toucher par tout, avant, arriere, à droit et à gauche*, &c." The fhip failed up the *Loire* to put into *Nantes*, and was loft.—It was held that the infurers were not anfwerable for the lofs, because the above claufe only gave liberty to touch at the ufual places in the courfe of the voyage infured; but not to increafe the rifk by going up the river beyond the place of deftination. *Vide Pothier*, h. t. n. 74.

" *or homeward-bound voyage*, at the Isles of *France* and " *Bourbon, and at all or any other place or places where-* " *soever.*"—There was also a clause in the policy, " That " the ship in this voyage might *proceed to, and touch, and* " *stay, at any ports or places*, as well on this, as on the " other side, of the *Cape of Good Hope*, without its be- " ing deemed a deviation."—The ship arrived at *Pondi-cherry*, and, after remaining there a month, sailed for *Bengal*, instead of going to *China*. Having wintered and undergone a repair there, she returned to *Pondicherry*. Both in going and returning, she touched at, and took in goods, or lay off, several places; and thus prolonged her voyage to and from *Bengal* much beyond the usual time. Having taken in her homeward cargo at *Pondicherry*, she proceeded on her voyage back to *L'Orient*, but was captured by an *English* privateer.—One question was, whether the voyage to *Bengal* was insured by the policy, under the general liberty to touch and stay *at any ports or places?*—Upon this point lord *Mansfield*, who tried the cause, held clearly, that these general words were, by the expressions "outward and homeward-bound voyages," and " in this voyage," qualified and restrained so as to mean only places *in the usual course of the voyage* to and from the places mentioned in the policy. It was then alledged on the part of the plaintiff, that the voyage to *Bengal* was adopted by *necessity*, for the safety of the ship: —And to prove this, witnesses were called to shew that the ship was so leaky at *Pondicherry*, that she appeared to require careening, which could only be done at *Bengal*, that being the nearest place to which she could proceed with safety for that purpose; that though it turned out, when she got to *Bengal*, that she could be repaired without careening, yet this was only discovered after she was unloaded of much more of her contents than could have been taken out of her in the open road of *Pondicherry*; that, besides the necessity of repair, she was delayed in unloading the outward cargo at *Pondicherry*, till it was too late to undertake the *China* voyage with safety; and *Bengal* was then the safest place to winter at.—The defence relied upon was, 1st, That the

ship

ſhip never ſailed on the voyage inſured, her true and original deſtination having been *Bengal*, and not *China*; 2dly, that, ſuppoſing her to have ſailed on the voyage deſcribed in the policy, yet, her going from *Pondicherry* to *Bengal*, inſtead of proceeding to *China*, was a deviation, and not juſtified by *neceſſity*.—In ſupport of the firſt ground of defence, ſecret inſtructions, found on board the ſhip, were relied upon, which, though obſcurely penned, gave room to ſuſpect either that before her departure, the *Bengal* voyage was ſubſtituted for that to *China*; or at leaſt that this alternative was left to the diſcretion of the ſupercargo, to be decided by events in *India*, which actually happened, ſo as to determine the voyage to *Bengal*.—On the ſecond ground, it was contended, that from the plaintiff's evidence it appeared that there was no neceſſity for going to *Bengal*; and that inſtead of going thither directly, a trading voyage had been made, which afforded a ſtrong preſumption that trading, and not the leak, or the lateneſs of the ſeaſon, was the object in going to *Bengal*; and ſeveral letters written by the owners alſo raiſed a preſumption that the neceſſity of going to *Bengal* was a pretence deviſed after the capture, when it was feared that the policy would not cover the voyage to that place.—Lord *Mansfield* ſummed up ſtrongly againſt the plaintiff on the ground of fraud. But independently of that, he ſaid that if neceſſity were admitted to have been the ſole motive for ſubſtituting the voyage to *Bengal* in the place of that to *China*, ſtill it was incumbent on the inſured to have purſued that voyage of neceſſity directly, in the ſhorteſt and moſt expeditious manner; and that the delay in going from *Pondicherry* to *Bengal*, and the repeated ſtops by touching at different places, and trading there, were deviations, and not within the protection which the ſuppoſed neceſſity afforded to the direct voyage to *Bengal*.—The jury, notwithſtanding this direction, found a verdict for the plaintiffs, which was afterwards ſet aſide, and a new trial granted, upon the following grounds:—That a deviation from neceſſity muſt be juſtified both as to the ſubſtance and manner; and nothing more muſt be done than what the

the neceſſity requires; that the true reaſon why a deviation diſcharges the inſurer, is not the increaſe of the riſk, but, that the party contracting has, without neceſſity, ſubſtituted another voyage for that which was inſured; that the neceſſity of the voyage to *Bengal* did not prove the neceſſity to trade, or to touch at a number of ports all out of the direct courſe, or to conſume ſix weeks or two months, inſtead of ſix days.—The plaintiffs afterwards ſubmitted to the opinion of the court, and abandoned their claim againſt the underwriters (*a*).

A letter of marque muſt not cruiſe in queſt of prizes. But ſhe may chace an enemy which comes in her way.

Nothing will juſtify a wilful deviation, but a real neceſſity to deviate; and therefore, if a ſhip having letters of marque, leave the convoy to which ſhe belongs, and cruiſe in queſt of prizes, though but for a ſingle night; this will be a fatal deviation (*b*).—But though the ſhip cannot, without deviating, cruiſe in queſt of prizes; yet if an enemy come in her way ſhe may give chace, and in ſo doing, ſhall not be deemed to deviate.

Jolly v. *Walker*, at N. P. Eaſt. Vac. 1781. *Beawes*, 316.

A letter of marque chaſes an enemy and then loſes ſight of her in the night, and in the morning engages her: This is no deviation.

Thus:—A ſhip, having letters of marque, was inſured, 'At and from *London* to *Cork* and the *Weſt Indies*.'—The ſhip in the night deſcried a ſhip of the enemy, and after chaſing, loſt ſight of her for ſix hours, and till the the morning, when they engaged. She did not take the enemy, but proceeded on her voyage, and was herſelf

(*a*) *Emerigon* (tom. 2. p. 62.), has given a tranſlation of this caſe, to which he adds ſome remarks in admiration of the adminiſtration of juſtice in *England*, which have been already mentioned, ſup. 30. He adds, that having been conſulted on this caſe by *Lavabre*, *Doerner* and company, bankers at *Paris*, who had lent 180,000 *livres* on bottomry on the ſhip and cargo, and were the inſured in the *Engliſh* policy, he anſwered 1ſt, That *Berard* and company, the borrowers, having broke their contract, it was juſt that they ſhould ſuffer the loſs occaſioned by their contravention of it. 2dly, That, by changing the voyage, the lenders on bottomry, as well as the inſurers, were diſcharged from the perils of the ſea; and conſequently that *Lavabre*, *Doerner* and company were entitled to recover from *Berard* and company the 180,000 *livres* lent on bottomry, together with the marine intereſt and the intereſt incurred ſince the ſame became due.——(*b*) Per lord *Camden* C. J. in *Cock* v. *Townſon*, at N. P. *Beawes*, 316.

afterwards captured.—It was agreed on all hands, that though a ſhip, in ſuch circumſtances, could not *cruiſe*, yet it was admitted by the underwriters, that if an enemy *came in her way*, ſhe might engage or defend herſelf, but they contended that, if ſhe loſt ſight of the enemy, it was no longer chaſing, but *cruiſing*.—Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

In the note of this caſe, which ſeems a very defective one, it is not ſtated whether the letter of marque, after ſhe loſt ſight of the enemy in the night, continued cruiſing for her till the morning, or reſumed her courſe to the *Weſt Indies*, and fell in with the enemy again by accident. Probably that was the queſtion left to the jury: If ſo, the inference will be that a *cruiſing* in hopes of meeting the enemy again, after ſhe had been loſt ſight of, would have been a deviation, though *chaſing* her was not (*a*).

A more recent caſe has occurred in which the queſtion, whether a ſhip inſured with liberty to carry letters of marque, may *chaſe* an enemy's ſhip, which ſhe happens to deſcry in the courſe of her voyage, either with a view to capture, or to promote ultimate ſecurity, came under diſcuſſion.

Parr v. *Anderſon*, 6 *Eaſt* 202.

Whether a ſhip, inſured with liberty to carry letters of marque, may deviate for the purpoſe of chaſing an enemy who comes in ſight.

That was an inſurance on the ſhip *Mercury* from *Liverpool* upon an *African* voyage, "*with or without letters of marque.*"—The ſhip, in the courſe of her voyage from *Africa* to the *Weſt Indies*, ſaw a ſail which proved to be a *Spaniard*, a quarter of a point upon her lee bow, whereupon *ſhe altered her courſe a quarter of a point*, and after purſuing her about a quarter of an hour, abandoned the chaſe and continued her voyage to the *Weſt Indies*, where ſhe arrived, but was afterwards wrecked.—The queſtion was, whether this was a deviation. The plaintiff contended that the liberty of carrying letters of marque authorized the ſhip to *chaſe* any veſſel which came in ſight, as contradiſtinguiſhed from *cruiſing* in queſt of prize; that otherwiſe the liberty would be nugatory, ſince, without letters of marque, any veſſel might

(*a*) See ſome obſervations on this caſe, 6 *Eaſt* 205.

defend herself against an enemy.—The defendant, on the other hand, insisted that this liberty gave the ship no authority *to go out of her course*, for the purpose of chasing or cruising, which necessarily led to hostile attack, and, in case of making prize, to the diminution of the crew, and a material increase of the risk from that of a mere commercial voyage; and that the use of the letters of marque was merely for the purpose of defence, and to capture an assailant, without the danger of being treated as pirates.—Lord *Ellenborough*, who tried the cause, left it to the jury to consider whether the deviation was for the purpose of capture, which the mere liberty to carry letters of marque, without more, would not justify; in which case they should find for the defendant; but if it were for defence they should find for the plaintiff.—They found for the defendant.—Upon a motion for a new trial, the court seems to have entertained considerable doubts upon this question, and directed a new trial, in order that the usage of trade, if any such existed in similar cases, might be ascertained. —It does not appear that the cause was tried again.

A liberty to cruise for a certain time in the voyage is to be taken as one continued period.

Sometimes a policy on a ship of force, with letters of marque, contains a clause giving liberty to cruise for a certain term in the course of her voyage. The following case will shew, that if it be meant that this term shall consist of different periods of time, taken separately, it ought to be so expressed; otherwise the cruise will be taken to be for one continued period of time, and not for several periods amounting to that time.

Syers v. Bridge, Doug. 509.

A letter of marque is insured for a voyage with liberty to cruise for six weeks, but no time mentioned for its commencement: The ship may cruise six *successive* weeks, but not at different times.

A letter of marque was insured, 'At and from *Liverpool* to *Antigua*, with liberty to cruise for six weeks, and to return to *Ireland*, or *Falmouth*, or *Milford*, with any 'prize or prizes.'—This policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or duration, of the voyage. The ship, in fact, sailed from *Liverpool* on the 28th of *February*, and kept on her direct course till the 14th of *March*, chasing, however, at different times, from the 7th to the 14th, when she began to cruise, the captain giving notice thereof to the crew, and ordering a minute of it to be

made in the log-book. She continued to cruise about the same latitude, till the 18th of *April*, and then discontinued it, and the captain again gave notice, intending to go to the *Burlings* off *Lisbon*, in the course of the voyage. On the 23d, she renewed the cruise, of which the captain gave notice as before, and continued it till the 28th, when she was taken by an *American* privateer.—The court determined that the liberty to cruise for six weeks, meant six *successive* weeks from the commencement of the cruise, and therefore, that cruising *at different times* was a deviation which discharged the underwriters.—Lord *Mansfield* said:—"This was merely a question of construction on the face of the policy; and, unless an usage could have been shewn in favour of this desultory cruising, calling witnesses to support it, was calling them to mere *opinion* None of those produced knew of any *instance*, and therefore their evidence ought not to have been received: Yet, I dare say, their testimony had great weight with the jury. The meaning of words depends on the subject. The instructions were not read; but they shew the meaning very clearly, for they run thus: "To cruise "six weeks, and *then* proceed to *Antigua*." There can be no general rule. Here the subject matter, in my opinion, is decisive to shew that the six weeks meant one continued period of time. There are frequently articles for a month's cruise, a six weeks cruise, &c. Such a liberty, as in this case, to a letter of marque, is an excuse for a deviation. But what is contended for by the plaintiffs is impossible in practice. Suppose the ship returns *directly back*, after cruising for the space of a week. She may then, perhaps, take three weeks to return to where she had been. Can she then renew the cruise, and return again, and so repeatedly? The voyage, in that way, might last for years. But the true meaning is, "I will "excuse a deviation for six weeks." Six weeks is a continuation, a congregate denomination of time. If they had meant separate days, they would have said 42 days."

Witnesses may prove an usage as explanatory of a clause in a policy; but their opinion of its meaning is not admissible evidence.

The power given to ships having letters of marque must be strictly pursued.

The power given in the policy to a ship having letters of marque, must be strictly pursued; and cannot be extended

tended by construction beyond its plain and obvious meaning.

Thus: The ship *Tamer*, having letters of marque, was insured from *Liverpool* on an *African* voyage, '*with leave* '*to chase, capture, and man prizes.*'—In an action on the policy to recover a loss by the perils of the sea, it appeared, that, upon the *Tamer*'s arrival upon the coast of *Africa*, she found there a *French* trading vessel, and anchored within six miles of her; that the next morning the *French* vessel stood out to sea, and was pursued about thirty miles and captured by the *Tamer*; that the *Tamer* returned to the coast with her prize, and, having finished her trading there, she sailed with her cargo and the prize for the *West Indies*, in the course of which she sprung a leak and foundered at sea, and the crew were saved by the prize, which had kept her company till she sunk; that the captain's instructions required him to take *under his protection* any ship he might capture; that the letters of marque, in the usual form, authorized him to bring all captures he might make to judgment in some court of admiralty within his majesty's dominions; that he continued with the prize for her protection, and not to receive protection from her; that several times during the voyage he *shortened sail and lay to*, in order to give time to the prize to come up, and particularly on one occasion when the prize carried away her fore-topmast.—Upon these facts the court were of opinion that neither the liberty given by the policy, "*to chase, capture, and man prizes,*" nor the instruction given with the letters of marque, required or authorised the captain to convoy his prize into port; and, therefore, that his shortening sail and lying to for the prize was a deviation which discharged the underwriters.

Lawrence v. *Sidebotham*, 6 *East* 45.

A liberty given to a letter of marque, '*to chase, capture, and man prizes,*' will not enable her to convoy a prize taken by her into port.

It is a rule that the ship shall proceed on her voyage, not only by the shortest and safest course, but also with all reasonable expedition: But a ship, by deviating, necessarily prolongs the risk. In the following case it was determined, that any unnecessary *delay* will be equivalent to a deviation.

The ship must perform the voyage within a reasonable time, and any unnecessary delay will amount to a deviation.

 A ship

Hartley v. *Buggin*, B.R. M. 22. G. III. MS. S. C. *Park*, 313.

A ship insured on a trading voyage on the coast of *Africa*, stays there beyond the usual time, as a receiving ship for slaves; this is equivalent to a deviation.

A ship was insured, 'At and from the coast of *Africa* 'to the *West Indies*, with liberty to exchange goods and 'slaves.'—It appeared that the ship stayed on the coast from *August* till *March*, and was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board those ships and sent to the *West Indies*; that this was the employment of what was called a *factory-ship*, but a regular factory-ship was thatched and covered, and received the slaves till a sufficient number were collected to send away; but it did not appear that any slaves, the produce of the ship's own cargo, were sent away in other vessels, though her stay on the coast was several months beyond the usual stay of ships in that trade.—The court decided that this was equivalent to a deviation.—Lord *Mansfield* said,—"The single point here is, whether there has not been what is equivalent to a deviation; whether the risk has not been varied. No matter whether the risk has or has not been thereby increased. If a ship insured for a trading voyage be turned into a floating warehouse, or a factory-ship, the risk is different. It varies the stay; for while she is used as a warehouse, no cargo can be bought for her. This is the law. The fact is, that, though this was not a regular *thatched* factory-ship, yet she was used as a thatched factory-ship is used. This being clear, it follows that the risk is different in point of length, from that which is generally understood in the trade, and consequently from that which was insured (*a*)."

But time spent in necessary repairs before departure, is not an unnecessary delay.

But though unnecessary delay is equivalent to a deviation, and will discharge the underwriters; yet where a ship is insured *at* and from a place, time spent before her departure in necessary repairs, shall not be deemed an unnecessary delay.

Smith v. *Surridge*, at N. P. 4 *Esp.* Rep. 25.

Thus: A ship was insured on the 15th *May* 1801, '*at and from Pilaw to London.*'—She had arrived at *Pilaw* the 13th of *May*, and it became necessary, while

(*a*) Vid. *Parkinson* v. *Collier*, inf. ch. 7. s. 5. in which lord *Kenyon* lays down the same doctrine.

she

she was there, to repair her. This being done she began to take in her cargo on the 1st of *July*; but at that time the water was unusually low, so that she could not get over the bar; and she was unable to sail till *November*, when the loss happened.—It was insisted that this delay discharged the underwriters, who had insured a summer, not a winter voyage.—But lord *Kenyon*, who tried the cause, said, "that a policy *at* and from a place attached on the ship while under repair, it not being necessary that she should have been sea-worthy when the policy was effected; that here the ship was ready to sail, but an unusual want of water detained her; and therefore, that this was not a voluntary delay amounting to a deviation, nor such as would discharge the underwriters."

A ship insured, "at *and from*," need not be sea-worthy at the time the policy is effected.

In the policy the voyage insured ought to be truly and accurately described; and where the voyage described is not the voyage intended, the policy will be void (*a*). But where the voyage described is meant to be performed, an intention to carry the ship to places out of the course of the voyage described, and even instructions for that purpose given to the captain before the ship's departure, will not avoid the policy, this being only an *intended deviation* (*b*); and until it be once begun, the underwriters will continue liable.

An *intended* deviation will not discharge the underwriters.

Thus:—An insurance was made, 'From *Carolina* to '*Lisbon*, and at and from thence to *Bristol*.'—It appeared that the captain had taken in salt, which he was to deliver at *Falmouth*, before he went to *Bristol*, but the ship

Foster v. *Wilmer*, 2 *Str.* 1249.

(*a*) See chap. 8. s. 3, n. 4.——(*b*) *Roccus* (not. 20.) says that the voyage is changed as soon as the captain begins, or even *agrees for*, another voyage. "*Si cœperit secundum viaggium licet non completum, vel convenerit asportare alias merces in alium locum.*"—*Emerigon* (tom. 2. p. 56.) denies this latter opinion, and holds that if the captain give up his new project, and proceed on the voyage insured, the insurers continue liable. *Casaregis*, (disc. 67, n. 24), says, "*Mutari viaggium tunc dicitur, quando primam principalem destinationem magister navis non sequitur utpote quod navis cum onere, et cum primis vecturis, ad locum destinatum amplius non intendit ire, nec eat;*" and this, I believe, is understood to be the law in *England*.

was

was taken in the direct road to both places, and before she came to the point where she would have turned off to go to *Falmouth*.—It was ruled by lord C. J. *Lee*, that the insurer was liable; for it was but an *intention* to deviate; which was not sufficient to discharge the underwriter.

Carter v. *Roy*. *Ex. Ass.* 2 *Str.* 1249.

In this case a former decision was cited, where the insurance was, 'From *Honduras* to *London*;' and it appeared that there was a consignment of goods to *Amsterdam*. A loss happened before the ship came to the dividing point between the two voyages; and here also the insurer was held liable.

Kewley v. *Ryan*, 2 *H. Bl.* 343.

A ship insured from *A.* to *B.*, sails on that voyage, but with a design to touch at *C.*; but, before she arrives at the dividing point, is lost:—The insurers are liable.

This doctrine has been adopted in a more modern case, where an insurance was made on goods, 'At and from 'Grenada to *Liverpool*, in ship or ships.'—It appeared that the ship on board of which the goods were laden sailed for *Liverpool*, but with a design *formed before the commencement of the voyage*, to touch at *Cork* in her way; but she was totally lost before she arrived at the dividing point.—Upon this case (*a*) it was determined that the insured was entitled to recover.—The court held that the *termini* of the intended voyage being really the same as those described in the policy, it must be considered as the *same voyage*; and a *design* to deviate, not effected, would not determine the policy (*b*). They observed that in *Wooldridge* v. *Boydell* (*c*), it appeared that there was no intention that the ship should go to *Cadiz* at all; and in *Way* v. *Modigliani* (*d*), the ship did not, when she left the port in *Newfoundland*, sail for *England*, but went to fish on the *Banks*. Here the ship was bound for *Liverpool*, though she had also clearances for *Cork*.

Stott v. *Vaughan*, at N. P. *Hil.* Vac. 1794.

Cont.

It is proper here to mention that, in the argument of the above case, that of *Stott* v. *Vaughan* was mentioned, which was an action on a policy on the same ship, for the same voyage, and which was tried before lord *Kenyon*,

(*a*) There were other points in this case for which it is cited, sup. ch. 5. s. 4.——(*b*) So ruled per *Holt* C. J. in *Green* v. *Young*, at N. P. 2 Lord *Ray*. 840. 2 *Salk*. 444.——(*c*) Inf. ch. 8. s. 3.——(*d*) Inf. ch. 8. s. 3.

who

who non-suited the plaintiff, upon the ground that the voyage intended was not the voyage described in the policy.

From a certain point in a voyage there are several tracks to the place of destination, with certain advantages and disadvantages belonging to each, and the captain has always been allowed, when he arrived at the dividing point, to elect, according to circumstances, which of these tracks he will pursue. One of these tracks is *prescribed* to him by the insured, aud this is not stated in the policy, nor even disclosed to the underwriters; and the ship having taken the course so prescribed, is captured.—The court determined that, under these circumstances, the insured could not recover for this loss.—Lord *Kenyon*, Mr. Justice *Ashhurst*, and Mr. Justice *Grose*, founded their opinion on the want of a full disclosure of the particular course the ship was to take, as being a circumstance that might materially have varied the risk; and this, whether it were considered as a concealment, or a defective description of the voyage in the policy, avoided the contract *ab initio*. Mr. Justice *Lawrence* founded his opinion on the ground that this was a *deviation*; and that if the ship had been captured before she came to the dividing point, the plaintiff would have been entitled to recover, as the captain's *intention* to deviate did not, before he came to the dividing point, subject the underwriters to any additional risk (*a*).

Middlewood v. *Blakes*, 7 T. R. 162, inf. ch. 8. s. 3.

If there be several tracks to the place of destination, of which the captain ought to be at liberty, when he is at the dividing point, to elect one; but the insured prescribe one to him, the insurer is discharged.—Q. Whether this ought to be considered as a deviation or a different voyage originally intended.

Sect. III.

What are the Cases of Necessity that will justify a Deviation.

A DEVIATION that will discharge the insurer, must be a voluntary departure from the usual course of the voyage insured, and not warranted by any necessity. If

If the master act *bonâ fide*, and only aim at performing the voyage in the shortest and safest manner, a departure from the direct course will be no deviation.

(*a*) See the opinions of the Judges on this case fully stated, inf. ch. 8. s. 3.

A deviation

a deviation can be justified by necessity, it will not affect the contract. And necessity will justify a deviation, though it proceed from a cause not insured against.

Scott v. *Thompson*, 1 New. Rep. 181.

Goods on board a neutral are insured against *sea-risk and fire* only; the ship is seized and detained by a *British* cruiser:— This is not a deviation, though occasioned by a cause not insured against.

As where goods were insured on board a neutral ship, 'At and from *Liverpool* to *Amsterdam*,' against *sea-risk and fire only*.—In the course of the voyage the ship was boarded by a *British* cruiser and carried into *Falmouth*, where she was detained six weeks, then released and permitted to proceed on her voyage. Upon her arrival at *Amsterdam*, the goods were found to have sustained some damage, occasioned by tempestuous weather in her passage from *Falmouth*. The underwriters contended that this deviation, not proceeding from a cause against which they had insured, was not justified by a necessity for which they were answerable, and therefore they were discharged.—But the court determined that they were liable.—Sir *James Mansfield* C. J. in delivering the opinion of the court, said,—"A deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship. Here the deviation is occasioned by force, which, in such a case, is necessity; and there is no ground for the distinction between a policy confined to sea-risk and fire, and a general policy including all risks."

One general principle pervades all the cases on this point; namely, that if the captain, in departing from the usual course of the voyoge, act fairly and *bonâ fide*, and according to the best of his judgment, for the benefit of all parties concerned, and have no other view than to conduct the ship and cargo by the safest and shortest course to her port of destination, what he does is within the spirit of the contract, and the voyage will still be protected by it. The ship may go out of the way to avoid danger, and the deviation, in that case, will be justified by necessity. But a necessity to justify a deviation, must be a real, inevitable, and imperious necessity; not created by the insured himself, or any agent of his. The duration and extent of it must be warranted by the degree of the necessity; the ship must pursue the voyage of necessity so as to get to her port of destination in the shortest

The extent of the deviation must be justified by the degree of necessity.

The ship must not deviate from the voyage of necessity.

shortest and most expeditious manner; and any wilful departure from the direct course of this new voyage, or any unnecessary delay therein, will be a new deviation that will discharge the underwriters, in the like manner as if it had been a wilful deviation from the original voyage (*a*).—To determine, therefore, in any case, whether a departure from the direct course of the voyage insured amount to a deviation that will discharge the insurer, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment (*b*).

The cases of necessity which are most frequently adduced to justify a departure from the direct or usual course of the voyage, are, 1. *Stress of weather;* 2. *The want of necessary repair;* 3. *Joining convoy;* 4. *Succouring ships in distress;* 5. *Avoiding capture or detention;* 6. *Sickness of the master or mariners;* 7. *Mutiny of the crew.* It will be proper to consider each of these separately.

1. *Of Deviation from Stress of Weather.*

IF a ship in a storm be driven to seek refuge in a port out of the usual course of the voyage, this shall not be deemed a deviation that will determine the contract: For it is a rule that what is occasioned by the act of God shall be imputed to no man as a fault. Nor is the ship obliged to return back to the point from whence she was driven, but may make the best of her way to her port of destination.

As, where the plaintiff, a merchant in the *West Indies*, wrote to the defendant who was his correspondent in *London*, desiring him to get an insurance effected on the ship *Friendship*, "At and from *St. Kitts* to *London*, war- "ranted

Delany v. *Stoddart*, 1 T. R. 22.

A ship, insured from *St. Kitts* to *London*, is driven by a storm out of the port of *St. Kitts* to *St. Eustatia*, and being unable to return, completes her cargo there, and proceeds on her voyage: This deviation will not discharge the insurers.

(*a*) See Lord *Mansfield*'s judgment in *Lavabre* v. *Wilson*, *Doug.* 271. inf.——(*b*) Per Lord *Mansfield* in *Enderby* v. *Fletcher*, at N. P. Trin. Vac. 1780. See *Pelly* v. *Roy. Ex. Assur.* 1 *Bur.* 347. inf. ch. 7. s. 5.

"ranted to ſail with convoy."—The defendant neglecting to make this inſurance according to the order, and the ſhip being loſt, the plaintiff brought an action on the caſe againſt the defendant to recover the loſs.—On the trial of the cauſe it appeared, that the ſhip left the port of *St. Kitts* to take in her cargo, and let go an anchor at *Sandy Point*; but as the wind blew freſh, ſhe drove out, and could not come in again, but was obliged to go to *St. Euſtatia*; that ſhe ſailed from thence with the convoy, and afterwards foundered at ſea; that *St. Euſtatia* is in the direct line from *St. Kitts* to *London*, and the convoy from *St. Kitts* always looked into *St. Euſtatia*, to take up any ſhips that might be there; that when the ſhip was driven to *St. Euſtatia*, after making ſeveral unſucceſsful efforts to get back to *St. Kitts* to finiſh her loading, ſhe took the reſt of her loading at *St. Euſtatia*.—The principal queſtion was, whether there had been a deviation (*a*).—The court determined that there was no deviation.—Lord *Mansfield* ſaid,—"The only queſtion is, whether this be the ſame voyage as that intended to be inſured. If a ſtorm drive a ſhip into any port out of the courſe of her voyage, and being there, ſhe do the beſt ſhe can to get to her port of deſtination, ſhe is not obliged to return back to the point from whence ſhe was driven: Here the ſhip tried to go back to *St. Kitts*, but could not; and it is a much eaſier navigation to go directly from *St. Euſtatia* to *London*, than to go back to *St. Kitts* firſt. She loſt no time in taking in her cargo at *St. Euſtatia*. Every thing ſhould be imputed to the ſtorm, which was in reality done and occaſioned by it. It was a queſtion to be left to a jury, whether this was the ſame voyage or not; and they have determined it.—Mr. Juſtice *Aſhhurſt* and Mr. Juſtice *Buller* concurred in this opinion, and laid much ſtreſs on the circumſtance of the riſk being diminiſhed by the ſhip's remaining at *St. Euſtatia*,

(*a*) In this action the defendant has a right to make every objection to the plaintiff's recovering which an underwriter might have made on an action on the policy, had one been regularly effected. Vid. inf. ch. 8. ſ. 2.

Eustatia, and completing her cargo there, instead of returning to *St. Kitts.*—Mr. Justice *Willes* differed from the other judges.

2. *The want of necessary Repair.*

THE *want of necessary repair* is another excuse for departing from the direct course of the voyage. If the ship, from stress of weather, or any other cause, be reduced to such a state that she cannot safely proceed on her voyage without repairs, the captain will be justified in carrying her to some port, the least out of his course, where such repairs can be had; and he must content himself with such repairs as can be most expeditiously done, so as to enable the ship to perform the voyage insured.

Motteaux v. Lond. Assur. 1 Atk. 545.

A ship, insured from *Fort St. George* to *London*, goes to *Bengal* to refit: This is no deviation, if she could not refit at *Fort St. George*, and *Bengal* was the nearest place.

As where a ship was insured 'from *Bengal* to *London*; 'the adventure to commence from her arrival at *Fort St. George*, with liberty to stay at any ports or places without prejudice.'—The ship came to *Fort St. George* in *February* 1733 in her way to *England*, but being leaky, and in very bad condition, by the advice of the governor and council, she sailed for *Bengal to be refitted.* After being refitted, the ship, in her homeward voyage, was stranded and lost.—There was evidence to prove that *Bengal* was the proper place to refit, and that the ship had her lading taken out, and went thither for that purpose only; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but provisions and ballast.—Lord Chancellor *Hardwicke*, though he admitted that want of necessary repair would justify a ship in going to the nearest place where that could be had; yet, as there was no proof to shew that the ship could not have been equally repaired at *Fort St. George*, he directed an issue to try whether the loss had happened during the voyage insured. The cause was tried at *Guildhall*, and the insured recovered.

If a ship, in the course of the voyage, be too heavily laden, she may land and sell a part of her cargo; or if too light, may take in ballast, or *goods* instead of ballast.

Though a ship, as we have already seen (*a*), having liberty to *touch and stay* at a place in the course of her voyage, is not at liberty to *break bulk* or to trade there; yet, if, in the course of the voyage, she appear to be too heavily laden, so that it become necessary to lighten her, she may, at the next convenient place, land and sell a part of her cargo.—So, if she be found to require ballast, and she cannot safely proceed on her voyage without it, she may, at the most convenient place, take ballast on board, or even *goods*, to supply the place of ballast.

Gilbert v. *Redshaw*, at N. P. *Hil.* Vac. 1781. *Park* 301.

The ship, in distress, puts into the nearest port to refit, and there takes in 500 rolls of tobacco as *ballast*: This is no deviation.

Thus:—A ship was insured, 'At and from *Rochelle* 'to the coast of *Africa*, during her stay and trade there, 'and at and from thence to *St. Domingo*.'—Three days after the ship sailed from *Rochelle*, she met with a gale of wind, which strained her seams, and split her mizen yard, and damaged her rigging. The crew, in a body, desired the captain, for the preservation of their lives, to make to some port to repair. The captain, finding that the ship, which was new, had too little ballast, complied, and put into *Lisbon*, the nearest port; from whence, after taking 500 rolls of tobacco, as ballast (*b*), he proceeded to *Guinea*, and fromthence for *St. Domingo*, but the ship was captured in sight of that island.—In an action on the policy, it was insisted, on the part of the defendant, that going to *Lisbon* was a deviation, and witnesses were called to prove that, from the latitude in which the storm happended, she might have proceeded to the coast of *Africa*, and there have repaired at a less expence, and that she could not need additional ballast. But it came out that no additional premium would have been required for liberty to touch at *Lisbon*.—Lord *Mans*-

(*a*) See *Stitt* v. *Wardell*, 1 *Esp*. N. P. Rep. 610. sup. 188.——

(*b*) For any thing that appears in the note of this case, the captain went to *Lisbon* only for ballast, nor does it appear that the ship had any sort of repair there. Perhaps the necessity of getting more ballast would have justified going to *Lisbon*: but that is not the ground upon which the case is stated to have been put.

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field laid much stress on this circumstance (*a*), and left it to the jury on the ground of the necessity the ship was in to go to *Lisbon* for *repairs*.—The plaintiff had a verdict.

But if the ship deviate for the purpose of repair, this, like every other voyage of necessity, must be pursued in the most expeditious manner; for if it appear to have been undertaken for any other object than repairs, it will not justify the deviation; or if there be any unnecessary delay in getting the repairs done, this will be equivalent to a new deviation.

The voyage of necessity must be pursued with expedition.

Thus:—A ship insured 'from *Port L'Orient* to *Pondicherry*, *Madras*, and *China*, and back to *France*, with 'liberty in the outward and homeward voyages to touch 'and stay, &c.' The ship after remaining a month at *Pondicherry*, sailed to *Bengal* instead of going to *China*; and having wintered and undergone a thorough repair there, returned to *Pondicherry*; and, both in going and returning, touched, and took in goods, at several places, whereby she greatly prolonged her voyage to and from *Bengal*. The ship being captured on her homeward voyage, and an action brought on the policy, one objection made by the underwriters was, that the ship's going from *Pondicherry* to *Bengal*, instead of proceeding to *China*, was a deviation.—The plaintiff replied that the ship was found to be so leaky at *Pondicherry*, that she appeared to require careening, which could only be done at *Bengal*, the nearest place to which she could go for that purpose; and that, though it turned out, when she got to *Bengal*, she could be repaired without careening, this was only discovered when much more of her cargo was got out than could have been taken out of her

Lavabre v. *Wilson*, *Doug.* 271. sup. 192.

A ship insured from *A.* to *B.* and *C.*, and back to *A.* after her arrival at *B*, sails to *D.* instead of proceeding to *C.*, alledging want of repair; but in going and returning, she stopped and traded at several places.—Supposing the necessity for a repair to have existed, such a voyage is not justified by it.

(*a*) The reason why a deviation discharges the underwriter is, not because the risk is thereby increased, but because the voyage performed is not the voyage insured. Vid sup. 185. The circumstance of the premium being the same, had liberty been given in the policy to touch at *Lisbon*, ought not, therefore, to have had any other effect than to prove that it was not originally intended to put into *Lisbon*; for if that had been intended, it might have been provided for in the policy, without any additional expence of premium.

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in the open road of *Pondicherry*.—But the court determined that the delay in going from *Pondicherry* to *Bengal*, and the repeated stops by touching and trading at different places, were deviations, and not within the protection which the necessity for repair, supposing that to have existed, would have afforded to the direct voyage to *Bengal*.—And the court laid it down that a deviation from necessity must be justified by the necessity, both as to the substance and manner of it; and that nothing more must be done than what the necessity requires; that if necessity were admitted to be the sole motive for substituting the voyage to *Bengal* for that to *China*, still it was incumbent on the insured to pursue that voyage of necessity directly, and in the shortest and most expeditious manner.

3. *To join Convoy.*

Joining convoy.

A third cause of justifiable deviation is when the ship is obliged to go out of her direct course to join convoy (*a*).

Bond v. *Gonsales*, at N. P. 2 *Salk.* 445. S. P. *Gordon* v. *Morley*, sup. 205; *Campbell* v. *Bourdieu*, 2 *Str.* 1265. and *Bond* v. *Nutt*, *Cowp.* 601. sup. 255.

If a ship go out of her way to join convoy, this is no deviation.

As where the *William* galley was insured, 'From *Bremen* to *London*, warranted to depart with convoy.'—The galley sailed from *Bremen* under convoy of a *Dutch* man of war, to the *Elb*, where they were joined by two other *Dutch* men of war and several *English* merchant ships. From thence they sailed to the *Texel*, where she found a squadron of *English* men of war. After a stay of nine weeks, they sailed from the *Texel*, and the galley, being separated in a storm, was taken by a *French* privateer, retaken by a *Dutch* privateer, and paid 80*l.* salvage.—In an action on the policy to recover this loss, it was ruled by lord C. J. *Holt*, that the voyage ought to be according to usage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for, till after the year 1703, there was no convoy for ships directly from *Bremen* to *London*; and the plaintiff had a verdict.

(*a*) *Per* lord *Mansfield* in *Bond* v. *Nutt*, inf. ch. 9. s. 3.

4. *Succouring*

4. *Succouring Ships in Diſtreſs.*

The ſuccouring of ſhips in diſtreſs is a duty which policy as well as humanity impoſes on every man who has the means of performing it; and a deviation for this purpoſe, being for the common advantage of all perſons, underwriters and others, is juſtifiable (*a*).

5. *To avoid Capture or Detention.*

To *avoid capture or detention* is another cauſe of excuſable deviation (*b*).

Thus:—The ſhip *Timandra* was inſured on a voyage from *Liſbon* to *Madeira*, from thence to *Saffi* on the coaſt of *Africa*, and back from *Saffi* to *Liſbon*.—When the ſhip arrived at *Madeira*, all the crew except two, alarmed by reports of *Mooriſh* cruiſers being off *Saffi*, and their having captured and ill-treated a *Dane* and an *American*, quitted the ſhip, and refuſed to return to her, unleſs the captain would promiſe to ſail immediately back to *Liſbon*. Under theſe circumſtances the captain carried the ſhip back to *Liſbon*; but on his arrival there, the charterer inſiſted on his proceeding directly from thence to *Saffi*, which he accordingly did, and was captured on his return from thence to *Liſbon*. After the ſhip's return from *Madeira*, the plaintiff wrote to his broker in *London*, deſiring to know whether, if the charterer ſhould inſiſt on the ſhip's going to *Saffi*, it would be agreeable to the underwriters that ſhe ſhould do ſo. The broker, in anſwer, gave it as *his* opinion, that the policy on the round voyage was at an end, and informed the plaintiff that he had effected a new policy on the voyage from *Liſbon* to *Saffi*.—It was contended on the part of the defendant, that though the deviation, in returning to *Liſbon*, might

Driſcol v. Bovil, 1 *Boſ. & Pul.* 313.

A ſhip is inſured from *A.* to *B.*, from thence to *C.*, and from *C.* back to *A.*—At *B.* the crew, being alarmed by information of pirates, oblige the captain to return to *A.*—The ſhip again ſails to *C.*, and is captured on her return.—The deviation was juſtified, and the inſurers liable. See alſo *Driſcol v. Paſmore*, inf. ch. 7. ſ. 5.

(*a*) Per *Lawrence* J., in *Lawrence* v. *Sidebotham*, 6 *Eaſt* 54.
—(*b*) *Roccus*, Reſp. 30. n. 1. & 31. n. 3. *Caſaregis*, diſ. 1. n. 68. *Pothier*, h. t. n. 51. *Emerig.* tom. 2. p. 57.

 poſſibly

possibly be justified by necessity, still it appeared by the plaintiff's letter, that the original object of the voyage had not been kept constantly in view, for it long depended on the will of the charterer whether the vessel should proceed or not; and the plaintiff himself was manifestly desirous of abandoning the voyage.—But the court determined that, though the plaintiff had acted with great prudence and circumspection, he had never abandoned the original voyage, but considered himself liable to continue it, should the charterer insist on his doing so.

6. *Sickness of the Captain or Crew.*

If, by sickness, or any other cause, so many of the officers or ship's company are disabled from performing their duty, as to render it impossible, or highly perilous, to proceed on the voyage, the ship may put into the nearest port where medical assistance, or other hands, can be procured; and the deviation in such case will be justified by the necessity.—But, to make out such a justification, it must clearly appear that this necessity arose without any default of the master or owners; and that if a surgeon were necessary in the voyage insured, a surgeon of competent skill, and furnished with all necessary instruments and medicines was on board (*a*).

7. *Mutiny of the Crew.*

The last case of this sort which I shall mention is, where the captain, under the *compulsion of a mutinous crew*, is forced out of the direct course of his voyage in order to pursue some other.

Elton v. *Brogden*, at N. P. 2 *Str.* 1264. inf. ch. 11. s. 6.

The crew of a letter of marque compel the captain to return home with a prize, instead of

As where a ship having letters of marque, was insured from *Bristol* to *Newfoundland*, and sailed with express orders that, if she should take a prize, some hands should be

(*a*) Per lord *Eldon* C. J. in *Woolf* v. *Claggett*, at N. P. 13th *December* 1801.

be put on board the prize and sent with it to *Bristol*; but that the ship should nevertheless proceed on her voyage. A prize being taken, the captain ordered some of the crew to carry it to *Bristol*, while he proceeded on his voyage. But the crew opposed this, and insisted on his going back to *Bristol* in company with the prize, though he acquainted them with his orders. He was forced to comply, and on his return, his own ship was taken.—The underwriters contended that this was a deviation by which they were discharged.—But lord C. J. *Lee* held, that this deviation was excused by the force which had been put upon the captain, which he could not resist, and that the case, therefore, fell within the excuse of necessity, which had always been allowed.

proceeding on his voyage, according to his orders: This will excuse the deviation.

Thus far as to the voyage. We will now proceed in the next chapter to consider the risks or perils against which marine insurances may be made.

CHAP. VII.

Of the Risks or Perils against which Marine Insurances may be made.

THE *perils of the sea*, taken in the largest sense, comprehend all those accidents and misfortunes to which ships and goods at sea are exposed, from causes which no human prudence can provide against or control; *quod fato contingit, et cuivis, quamvis diligentissimo, possit contingere.*

Though these perils are all incident to sea voyages, yet we distinguish those which arise from storms and tempests, rocks and sands, and which are strictly speaking, the *perils of the sea*, from such as proceed from causes which are also incident to maritime adventure, but which may exist when the winds and waves are all propitious; such as enemies, fire, the unskilfulness or wilful misconduct of the master or mariners, &c.

It is not proposed, in the present chapter, to shew the nature and properties of each particular species of risk, nor to which of them a loss shall be referable, because this will more properly occur when we come to treat of the losses themselves. For the present it will be our business to shew,

I. *Against what risks an Insurance may be legally made;*

II. *What are within the common Policy;*

III. *What are excluded by the usual Memorandum;*

IV. *To what the Owners and Master of the Ship are liable;*

V. *What shall be the Duration of the Risk;*

VI. *Whether it may be changed after the Policy is subscribed.*

Sect.

Sect. I.

Against what Risks Marine Insurances may be legally made.

INSURANCES may be made against all the risks or perils which are incident to sea voyages, subject, however, to certain exceptions, founded in public policy, and the interests of humanity, which require that in certain cases, men shall not be permitted to protect themselves against some particular perils by insurance.

Insurances may be made against all marine risks, with certain exceptions.

Upon principles of natural justice, the insurer can, in no case, make himself answerable for any loss or damage *proceeding directly from the fault of the insured*; because no man can bind himself to me to be answerable for my faults (*a*).

Not against a loss occasioned by the fault of the insured.

In the third chapter of this book, which treats of the subject matter of marine insurances, we have already shewn that insurances upon any traffic intended to be carried on contrary to the laws of this kingdom, or those of its dependencies, or to the law of nations, are void; and that the adventurer in such traffic cannot be protected by insurance, even against the ordinary perils of the sea, much less against the risk of seizure and confiscation, to which such illicit commerce, when detected, is generally exposed.

Nor even against the perils of the sea, upon illegal commerce.

In most foreign countries, insurances on the lives of men are prohibited.—In *France* they have always been deemed illegal (*b*), and are expressly forbidden by the ordinance of *Louis* XIV. (*c*); because, say the *French* writers, it is an offence against public decency, to set a price upon the life of man, particularly the life of a freeman, which is above all valuation (*d*). 'But these 'reasons,' says *Pothier* (*e*), 'do not apply to *slaves*.—*Ne*'*groes*, being on article of commerce, and capable of

Whether the lives of men may be insured.

In the case of negro slaves.

(*a*) Vid. *Pothier*, h. t. n. 65.——(*b*) *Le Guidon*, ch. 16. art. 5.——(*c*) Tit. *Des assurances*, art. 10.——(*d*) *Valin*, h. t. art. 10. p. 54. *Pothier*, h. t. n. 27.——(*e*) Ubi sup.

 'valuation,

'valuation, there is no reason why the lives of such persons should not be the subject of insurance.'

This doctrine is evidently contrary to the express provisions of the 10th article of the ordinance above cited; and it is curious to observe by what sort of reasoning *Valin* attempts to vindicate it.—'It being permitted,' says he, 'by the 11th article of the same ordinance, to 'insure the persons of captives redeemed out of slavery, 'to the amount of their ransom against re-capture, or any 'death except natural death upon their return to their 'native country, it has become a practice, by the ap'plication of this article to a *similar case*, to insure *negro* '*captives, bought* on the coast of *Guinea*, who are gene'rally valued in the policy at so much per head; and in 'such case, the insurer becomes liable for their loss by 'the perils of the sea, or by death; but the case of *natural* '*death* is always excepted, conformably to the last men'tioned article. By *natural death* is understood, not only 'that which arises from sickness, and common diseases, 'but that also which the slaves themselves often seek in 'the moment of despair; because these are accidents hap'pening *in the course of nature*, or occasioned by the *inhe*'*rent vice of the article*, or sometimes by the fault of the 'master, which, therefore, ought not to fall on the in'surers. But it is otherwise, when they are killed or 'thrown overboard in a revolt; for then, by the *French* 'law, the insurer is liable (*a*).

So that, according to this learned author, the disposition to suicide is natural, in negro slaves, and imputable to the *inherent vice of the article*, and their death proceeding from this cause must be deemed *natural* death. But the killing them, or throwing them overboard in a revolt, is a loss incident to this trade, and a peril within the policy.

In *England* the slave trade is now abolished.

It was long lamented, that with us also, the unfortunate objects of this cruel traffic were too much considered as mere merchandize; and the insured upon this trade formerly recovered, under the common policy, for

(*a*) *Valin*, h. t. art. 11. p. 55.

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any loss sustained in the voyage by the mortality of the slaves, whether they were thrown overboard, in cases of supposed necessity, or died a natural death, or perished by the perils of the sea. *British* humanity long bewailed the sufferings of these unhappy victims. The legislature, touched by this sensation, interposed, and, for some time, by an annual act, certain regulations were made with a view to *interest* the persons concerned in this trade in the preservation of the lives and health of the slaves. At length, by the stat. 47 *G.* III. c. 36. (*a*), this trade has been totally abolished, all insurances upon it declared unlawful, and a penalty of 100*l*., and treble the premium imposed on any of his majesty's subjects who shall subscribe, effect, or make any such unlawful insurances.

Sect. II.

What Risks or Perils are within the common Policy.

THE words of an *English* policy, which specify the various risks against which insurances are usually made, are these:—'Touching the adventures and perils which 'we the assurers are contented to bear, aud do take upon 'us in this voyage, they are of the seas, men of war, 'fire, enemies, pirates, rovers, thieves, jettisons, letters 'of mart and counter-mart, surprisals, takings at sea, 'arrests, restraints and detainments of all kings, princes, 'and people, of what nation, condition, or quality so'ever; barratry of the master and mariners; and of all 'other perils, losses, and misfortunes, that have or shall 'come to the hurt, detriment, or damage of the said 'goods and merchandizes, and ship, &c. or any part 'thereof, without prejudice to this insurance (*b*).

The words which specify the risks.

(*a*) Sup. 94.——(*b*) In all the *French* policies they add the words, "*connus ou inconnus*," or other words of the like import; and the insurer, by express words, puts himself in the place of the insured. Vid. *Valin* on art 47. h. t. p. 113.

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Effect of them.

Some foreign authors think that, under words nearly similar, the insurer is not liable for losses arising from unusual or extraordinary accidents (*a*). But the sweeping words, in the latter part of the above clause, in our *English* policies, would seem to preclude all doubt on this subject, as being sufficiently comprehensive to embrace every species of risk to which ships and goods are exposed from the perils of sea voyages.—*Molloy* (*b*) says, 'Almost all those curious questions that former ages and 'the civilians, according to the marine law, nay, and 'the common lawyers too, have controverted, are now 'out of debate. Scarce any misfortune that can happen, 'or provision to be made, but the same is provided for 'in the policies that are now used; for they insure 'against heaven and earth, stress of weather, storms, 'enemies, pirates, rovers, &c. or whatever detriment shall 'happen or come to the thing insured (*c*).'

Our courts do not, however, allow such a latitude of construction to the words of the policy. They seem rather inclined to confine the liability of the insurer to the particular perils specified, without much regarding the general sweeping words; and therefore, if, after a ship has sailed on her voyage, it be discovered that the port of destination is shut against all ships of her nation, and in consequence of this a perishable cargo on board be lost; this, though a loss arising from a misfortune incident to maritime adventure, and which could neither be foreseen or prevented by the insured, is now holden not to be a loss within the policy.

Hadkinson v. Robinson, 3 *Bos. & Pul.* 388.

A ship with a cargo of *fish* sails from *Falmouth* for *Naples*, and in her voyage is informed that *Naples* is shut against *British* ships, and the commander of the convoy orders the ship into *Port Mahon*, where the fish is sold

As where an insurance was made on a cargo of pilchards on board the *Paxaro*, 'From any port in '*Cornwall*, to *Naples*.'—In an action on the policy, it was averred

(*a*) *Roccus* not. 63. *Santerna* part 3. n. 72 *Pothier des obligations*, n. 668. — (*b*) B. 2. ch. 7. s. 7.—(*c*) *Sub nomine periculi, de quo sit cautio comprehenditur omnis casus qui accidit in mari, a tempestate, ab hostibus, prædonibus, reprisaliis, ut vocant arrestis aliisque modis usitatis et inusitatis citra fraudem et culpam contrahensium, aut domini mercium vel navis.* *Grot.* de jur. Hol. part. 24.

averred in the declaration, 'that whilst the ship was sail-'ing on the voyage insured, the port of *Naples* was, by 'authority of the government there, shut against all '*British* ships and merchandizes, whereby the said ship, 'with her cargo on board, was prevented from pursuing 'her voyage to *Naples*, the voyage was thereby lost, and 'the pilchards became of no value to the plaintiff.'—Upon the trial it appeared that the ship having taken in a cargo of pilchards at *Penzance*, sailed from thence to *Falmouth* to join convoy, and on the 24th of *January* 1801 sailed on the voyage insured; that on the 5th of *March* she received intelligence that *English* vessels were excluded from all the ports of the king of *Naples*, and on the 16th all the masters of ships were called on board the *Seahorse* man of war, and those who were destined for *Naples* or *Sicily* were ordered not to proceed to those places, but to make *Port Mahon*; that upon the ship's arrival there the report was confirmed, and a survey being made, the cargo was sold by auction, under the authority of the vice admiralty court there, and fetched a very small sum; that the plaintiff on being informed of the fate of the cargo, abandoned it, and demanded as for a total loss.—The jury, conceiving that the loss in this case did not proceed from any of the perils insured against, found a verdict for the defendant.—Upon a motion for a new trial, it was contended that this was a loss by detention of princes.—But the court determined that the verdict was right.—Lord *Alvanley*, in delivering the opinion of the court, said,—"Any loss which necessarily arises from capture or detention of princes is a loss within the policy: But here the captain, learning that, if he entered the port of destination, the vessel would be liable to confiscation, avoids that port, whereby the object of the voyage is defeated. This does not operate to the total destruction of the thing insured. If it could, the plaintiff might have abandoned at *Falmouth*, in case intelligence had been received there that the ship could not safely proceed to *Naples*. A loss of the voyage, to warrant the insured to abandon, must be occasioned by a peril acting upon the subject matter of the insurance immediately, and not circuitously, as in the present case.

For a very small sum.—This is not a loss within the policy.

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The detention of the ship at a neutral port, to avoid the danger of entering the port of destination, cannot create a total loss within the policy, because it does not arise from any peril insured against."

Lubbock v. Rowcroft, 5 Esp. Rep. 50.

The port of destination being in the hands of the enemy is not a loss within the policy.

So where an insurance was made on 20 bags of pepper from *London* to *Messina*, and the ship having arrived at *Minorca*, it was there discovered that *Messina* was blockaded by, or in the hands of the *French*. Upon intelligence of this the insured abandoned.—Lord *Ellenborough*, who tried the cause, was of opinion that this was not a loss within the policy, for which the insured had a right to abandon; for if this were allowed, every ship about to sail for a port which had fallen into the hands of enemy might be abandoned.

If by the terms of a charter party, the owner of a a ship becomes entitled to receive the freight upon part of the voyage being performed; and after this part of the voyage is performed, but before the freight is paid, the ship be lost, so that the voyage for which the freight became due could not be finished; this is a loss within a policy on freight, and the underwriters are liable.

Atty v. Lindo, 1 New Rep. 236.

Freight, by agreement, became payable when only part of the voyage was performed, but, before the freight is paid, and before the voyage is finished, the ship is lost; this is a loss on freight within the policy.

As where freight was insured 'from *London* to *Jamaica*, with liberty to touch at *Madeira*, and there 'discharge her *London* cargo, and take goods on board 'for *Jamaica*.'—In an action on the policy, it appeared that the plaintiff had chartered the ship to one *De França*, to take a cargo of goods from *London* to *Madeira*, and there deliver all, or such part of them as the agents of this freighter should direct, and there receive from them such a quantity of wine as they should think proper, and proceed therewith to *Jamaica*; in consideration whereof *De França* was to pay 135*l.* for freight for the whole voyage, such freight to be paid, in *Madeira* 'on a right 'and true delivery of the outward cargo, in wine at 40*l.* '*per* pipe;' that the ship with a cargo of bale goods and some coals in old wine casks, arrived at *Madeira* on the 26th of *February* 1804, and on the 28th began to deliver her cargo, the whole of which, except 33 casks of coals, (which were kept on board as ballast to stiffen the ship till the cargo for *Jamaica* should be shipped) was discharged,

charged, and 69 pipes of wine put on board for *De França* by the 7th of *March*, on which day a gale of wind arofe, and on the 9th the mafter was obliged to cut his cable and run out to fea, where the fhip was foon after captured.—On the part of the defendant it was contended, 1. That, before the fhip was forced to leave *Madeira*, the plaintiff's right to freight, as againft *De França* had vefted, and could not be devefted by any fubfequent event; and that the plaintiff having a right to recover this from *De França*, could not demand it of the underwriters. 2. That even fuppofing the plaintiff entitled to any thing, yet, as the voyage mentioned in the charter party was divifible, he could only demand for freight from *Madeira* to *Jamaica*, the freight from *London* to *Madeira* being clearly earned.—But the court were of opinion that one of the perils infured againft having rendered it impoffible for the mafter to receive the freight at *Madeira*, and the fhip being thereby prevented from performing the remainder of the voyage, *De França* was not obliged to pay the freight; and therefore the plaintiff was entitled to recover.

Sect. III.

What Rifks are excluded by the ufual Memorandum.

BY the agreement of the parties, the general words of the policy may be altered or qualified, and any of the rifks may be wholly or in part excluded and the infurance made only againft fome particular rifks, or up to, or beyond, certain degrees, or upon particular articles.

In order to confine infurances to that which ought to be their only object, namely, an indemnity againft real and important loffes, arifing from the perils of the fea; and to obviate difputes refpecting loffes arifing from the perifhable quality of the goods infured, and all trivial fubjects of difference and litigation, it feems to be the general law of all maritime ftates, and it is expreffly

Ufual memorandum.

presly provided by the ordinance of *Louis* XIV., that the insurer shall not be liable for any partial loss, unless it exceed *one per cent.* (*a*); and this, by stipulation, is often augmented in *French* policies to three or four *per cent.* (*b*). Beside this, a clause has been intoduced into the policies of most countries, by which it is stipulated that the insurer shall not be liable for any partial loss under a given rate *per cent.*—In *England*, it is now constantly stipulated in all policies, that upon certain enumerated articles of a quality peculiarly perishable, the insurer shall not be answerable *for any partial loss whatever*; that, upon certain others, liable to partial injuries, but less difficult to be preserved at sea, he shall only be liable for partial losses *above five per cent.*; and that, as to all other goods, and also the ship and freight, he shall only be liable for partial losses *above three per cent.*.

Its use. This stipulation is made by a memorandum in the form of a warranty, inserted at the bottom of all *English* policies. It was first introduced here about the year 1749; before which time the insurer was liable for every injury, however small, that happened to the thing insured. It was therefore thought better, by such a stipulation, to free him from small partial losses, than to compensate him for the extraordinary risk, by adapting the premium to the nature of the commodity. This must, in such cases, either have rendered the calculation of the premium a matter of much nicety, or else have made the policy too complicated; a mode of insurance which was the less likely to be adopted here, as the *Dutch* had before tried it, and were afterwards obliged to abandon it (*c*).

But though all our policies thus provide against trivial demands on account of small partial losses, yet they all indemnify the insured against every loss, however inconsiderable, arising from any cause affecting the general safety of the ship and cargo. Losses of this sort, being of the nature of *general average*, are so called in the memorandum; and there is, therefore, annexed to each of the

(*a*) Vid. *Valin*, on art. 47. h. t. p. 113.—(*b*) *Pothier*, h. t. n. 165.—(*c*) 3 *Bur.* 1551.

provisions above mentioned, an exception of general average. In the policies of private insurers, the case of the *stranding of the ship* is likewise excepted.

In the common policies used in *London* by private underwriters, the memorandum runs thus: Its form.

'N. B. Corn (*a*), fish, salt (*b*), fruit, flour and seed, 'are warranted free from average, unless general, or the 'ship be stranded:—Sugar, tobacco, hemp, flax, hides 'and skins, are warranted free from average, under *five* '*per cent.*; and all other goods, also the ship and freight, 'are warranted free from average, under *three per cent.* 'unless general, or the ship be stranded (*c*).' In the policies of private underwriters.

This form of the memorandum was generally used, not only by private underwriters, but also by the two insurance companies, from its first introduction in 1749, till the year 1754, when a case occurred on a policy on *corn*, where the ship being *stranded*, the insured recovered a partial loss to the amount of about 80*l per cent.*—Lord C. J. *Ryder* and a special jury, considering the words, '*free from average, unless general, or the ship be stranded,*' as a *condition*, and holding that by the ship's being stranded, the insured was let in to prove his *whole partial loss* (*d*).

Cantillon v. *Lond. Assur.* at N P. in 1754, cited 3 *Bur.* 1553.

The words, "*or* "*the ship be* "*stranded*," make a *condition*; and any stranding lets in the insured to claim his whole partial loss.

(*a*) The term *corn* comprehends every sort of grain, and also peas and beans. Vid. *Mason* v. *Skurray*, inf. (*b*) The term *salt* does not comprehend *salt petre*. Per *Wilson* J. at N. P. after East. 27 *G.* III. in *Journu* v. *Bourdieu*. —(*c*) The only material difference between the memorandum of private underwriters, and those of the two insurance companies consists in this, that the latter omit the words '*or the ship be stranded*,' and insert *rum* among the articles upon which they will not be liable for any partial loss under five *per cent.*. They also omit *freight* out of the articles upon which there shall be no partial loss under three *per cent.*.—Vid. the forms of the different policies in the schedule to the 35 *G.* III. c. 63. and in the Appendix, numbers I. and II.——(*d*) There is a note in 2 *Mag.* 385. in which this case is loosely mentioned, as affording a reason for striking the words, "*or the ship be stranded*," out of all policies. But the case as cited by Sir *Fletcher Norton*, as above, is the only one to be relied on. Vid. 7 T. R. 222.

In

The two insurance companies omit the words, "or the ship be "stranded."

In consequence of this determination, the *London Assurance* company, in their policies, left out of the memorandum, the words '*or the ship be stranded;*' and the *Royal Exchange Assurance* soon after adopted the same alteration. Private underwriters, however, have continued the memorandum in its old form, probably with a view to encourage merchants to insure with them, in preference to the two insurance companies; and it must be owned, that cases may occur where the difference may be of considerable importance to the insured.

Construction of the words, "*free "from average, "unless general, "or the ship be "stranded.*"

Much doubt has arisen as to the true meaning of the words, '*free from average, unless general, or the ship be 'stranded;*' and a different construction having been put on this clause by judges of the highest eminence, the best mode, perhaps, of shewing how it is now understood, will be to state the various decisions upon it, subsequent to the above case of *Cantillon* v. *Lond. Assurance*, in the order of time in which they occured.

The word *unless* has been held to make an *exception*, not a *condition*.

In the first of these, which was determined in the year 1764, the only point decided by the court was, that the underwriters were, by the memorandum, exempted from any responsibility for a partial loss, sustained by a cargo of corn in a storm; the ship not having been *stranded*, and this not being a *general average*.—But it will appear, that lord *Mansfield*, in delivering the opinion of the court, over-rules the decision of Sir *Dudley Ryder* in *Cantillon* v. *London Assurance*, and founds his judgment on the ground, that the above words do not make a *condition*, but only an *exception*; and that the insurer is liable only for partial losses upon corn, &c. *arising* from the ships being *stranded*, or of the nature of a *general average*; but to no other partial losses.

Wilson v. *Smith*, 3 *Bur.* 1550.

A ship, with a cargo of corn, having met with a storm, is obliged to run for the nearest port to refit, where she incurs a considerable expence in repairs. On her arrival at her

That was an insurance on a cargo of wheat, 'At 'and from *Lancaster* to *Rotterdam*.'—The policy contained the usual memorandum.—It appeared that the ship, in her voyage, met with a violent storm, by which she was obliged to part from her cable and anchor, *for the safety of the ship and cargo*; that she was greatly damaged, and obliged to run for the first port, being *Liverpool*, to refit, where she incurred a considerable expence in refitting; that the ship being refitted, she proceeded on her

voyage, and arrived at *Rotterdam*, where the wheat was landed, and appeared to have received damage by the storm, to the amount of 56*l.* 19*s.* 8*d.* *per cent.*—The question was, upon the above clause, whether this could be recovered against the insurer.—For the plaintiff, it was contended, that the words of the memorandum amounted to a *condition* to be free from average, unless, in the case of a *general average*, or the stranding of the ship: But, if *either* of these events should happen, this warranty was discharged; and as an authority for this, the cause of *Cantillon* v. *London Assurance* (*a*), was relied on—On the other side, it was insisted, that these words only made an *exception*, to be free from average in all other cases, but these two; and as neither of them had happened in this instance, the insured had no claim on the insurer.—The court were of this opinion, and gave judgment for the defendant.—Lord *Mansfield*, in delivering the opinion of the court, said—"That an ambiguity arose in the policy, from its using the words *average* in different senses; it being used to signify *a contribution to a general loss*, and also a *particular partial loss*; that, whether taken in the one sense or the other, it would not avail the plaintiffs; for if it signified *contribution*, the insurer was to be free from contributing, unless the contribution were *general*; if it signified *loss*, then plainly the warranty was, that the insurer should be free from all *particular* losses; that the insurer was liable for all losses *arising* from a stranding of the ship, and where there was a *general* average; but that all other *partial* losses were excluded by the terms of the policy; that the word *unless* meant the same as *except*, and was not to be construed as a *condition*, in the sense contended for (*b*); and that the words 'free from average, *unless general*,' could never mean to leave the insurer liable to any *particular* average."

port of destination, it is found that the corn is greatly damaged. —It was holden that this loss, not being of the nature of a *general average*, nor arising from the ship's being *stranded*, cannot be recovered; the words of the memorandum not making a *condition*, but only an *exception*.

(*a*) Sup. 223.——(*b*) Lord *Kenyon* in his judgment on the case of *Burnet* v. *Kensington*, inf. 234. considers this as an *obiter dictum*, which does not bring conviction to his mind.

Mason v. *Sturray*, at N. P. after *Hil.* 1780.

A cargo of *corn* arrives at the port of delivery so damaged in the voyage as to be worth less than the freight:—Yet, the ship not having been *stranded*, and it not being a *general average*, the insurer is not liable.

The next was a *nisi prius* case, before lord *Mansfield*, in 1780, and was an insurance on a cargo of *peas* (*a*), 'from *London* to *St. Augustine*;'—The peas arrived at the port of destination, but so much damaged in the voyage, that they produced but about one-fourth of the amount of the *freight*; which, as the ship arrived at her port of discharge, became due.—The insured brought an action to recover as for a total loss.—The defence was, that, if the goods mentioned in the memorandum arrived *at the market*, though a loss equivalent to a total loss had happened, the insurer was not liable.—Four or five witnesses, conversant in settling losses upon policies, proved that the usage, in such cases, was, to hold the underwriter discharged.—Lord *Mansfield*, in his address to the jury, said,—"This is a question of consequence, and turns upon the general import of the exception. The witnesses examined have put it on that point, and they hold, that if the specific thing come to the port of delivery, the underwriter cannot be called upon. Before the year 1749 (*b*), when the policy was general, and operated as an indemnity, there was little difference between a total and a partial loss."—Having then stated the case of *Boyfield* v. *Brown* (*c*), which, he observed, was prior to the memorandum in question, he said—"But the cases now stand upon that memorandum, which is in very general words: The question is, whether the usage has not explained the generality of the words. If it has, every man, who contracts under an usage, does it as if the point of usage were inserted in the contract *in terms*. The witnesses all swear it to have been understood, that if the specific thing come to the market, the memorandum warrants the insurer to be free from any demand as for a partial loss."—The jury found for the defendant.

Effect of usage upon this contract.

Though the case of *Boyfield* v. *Brown* was several years before, and this long after, the introduction of the

(*a*) *Peas*, in a former action on the same policy, had been holden to be *corn*, within the meaning of the memorandum.——(*b*) Vid. Sup. 223.——(*c*) 2 Str. 1065. inf. c. 13. s. 1.

memorandum

memorandum into policies of insurance, it is very difficult to reconcile them. Lord *Mansfield* seems inclined to *distinguish* them, by observing, that before the year 1749, when the policy was general, there was little difference between a total and a partial loss; but that, since then, the cases stood on the memorandum.—It is true, that where there is but little difference between a total and a partial loss, it is of little importance, how the question is decided: But lord *Hardwicke* was too good a lawyer not to be aware of the consequences likely to result from the precedent; and indeed it appears that, in the case of *Boyfield* v. *Brown*, he founded his judgment on the usage of trade, as it was in evidence; namely, that where the salvage exceeds the freight, the freight is deducted from the salvage, and the difference is the loss. From this his lordship very justly infers, that where the salvage falls short of the freight, the plaintiff is entitled to have it considered as a total loss.

The following case, which came before the court some years after the above case of *Mason* v. *Skurray*, was decided upon the same principle, or rather carried the principle farther.

Cocking v. *Fraser*, B. R. East. 25 G. III. MS.

If the enumerated articles, *specifically remain*, though, by sea damage, they are rendered of no value, and the ship has not been stranded, the insurer is not liable.

An insurance was made 'on ship and goods, at and 'from *Newfoundland* to her port of discharge in *Portugal*,' with the usual memorandum.—The defendant paid into court 16*l.* 19*s.* 6*d.*, viz. 8*l.* 15*s.* *per cent.* as *general* average on the cargo, and 8*l.* 4*s.* 6*d.* as a *particular* average on the ship.—There was a verdict for the plaintiff for 51*l.* 15*s.*, subject to the opinion of the court. on a case, which stated,—That the ship sailed on the voyage insured on the 2d of *December* 1783, with a cargo of fish; that on the 11th, 40 quintals were hove over board, for the preservation of the ship and cargo; that on the 20th, 26 quintals more were thrown overboard, for the same purpose; that the ship had very bad weather till the 10th of *January*, when she was obliged to put into *Lisbon*, though bound to *Figara*; that at *Lisbon* she was surveyed by the board of health, at the desire of the captain, who was the consignee; and it appeared to them that the cargo, through sea damage, was

rendered *of no value*; that the ship, therefore, did not proceed to *Figara*.—Upon this case the court were of opinion, that the underwriter was answerable for no more than he had paid into court on account of general average on the cargo, and particular average on the ship.—Lord *Mansfield* said,—"The clause relative to fruit and fish is now a very old one in policies of insurance. The insurer undertakes for all losses upon these articles, except particular damage, within a certain amount, unless the ship be stranded; he therefore engages against a total loss. Now a total loss of the thing insured, is *the absolute destruction of it by the wreck of the ship*. The fish may all come to port, though, from the nature of the commodity, it may be damaged, it may be stinking: Still, as the commodity *specifically* remains, the underwriter is discharged (*a*)"—Mr. Justice *Buller* said,—"That from the first introduction of the clause in 1749, to the present time, the underwriter has never been held answerable, but where there has been a *total loss* of the articles mentioned in it."

In the next case which occurred on this subject, lord *Kenyon*, at *nisi prius*, held, that where the ship has been *stranded*, the articles mentioned in the memorandum are put in the same situation as any other commodity; and that the insurers become liable for all damage which they may sustain, though *not arising* from the stranding.

Bowring v. *Elmslie*, at N. P. after Tr. 1790. cited 7 T. R. 216.

The memorandum controls the general words of the policy, as far as it extends. But, upon a *stranding* the enumerated articles are put in the same situation as any other commodity; and the insurers become liable for all damage sustained by them, though not arising from the stranding.

There, an insurance was made on *fish* on board the *Nymph*, 'from *Chaleur Bay* to her port or ports of discharge, in *England*, *Ireland*, *Portugal*, *Spain*, or *Italy*,' with the usual memorandum.—An action was brought

(*a*) *Pothier*, (*Contrats Maritimes*, n. 59.) holds, that if a cargo of corn become *entirely rotten*, the insured cannot abandon; this being only a simple average, which would not excuse the insured from paying the stipulated freight. His reason is, that though the corn be damaged or spoiled, it still exists. The damage does not operate an entire loss, and the owner is not deprived of it. Vid. *Emerig*. vol. 2. p. 184. But see the observations of lord *Kenyon* on this judgment of lord *Mansfield*, in *Burnett* v. *Kensington*, inf. 234. and those of lord *Alvanley* upon it in *Dyson* v. *Rowcroft*, inf. 238.

on

on the policy to recover a partial loſs ſuſtained by the fiſh, the ſhip having been, as the declaration ſtated, *ſtranded*; that is, ſhe was in ſuch a leaky condition, that the captain and crew thought it neceſſary to run her on ſhore off *Malaga*, for their own preſervation, thinking it would be impoſſible to get her into port.—On the part of the defendant, there was evidence to ſhew that there was no neceſſity for running the ſhip on ſhore, but that it had been done with a fraudulent intention; and it was contended, that even ſuppoſing the ſhip to have been unavoidably ſtranded, the greateſt part of the damage ſuſtained by the fiſh was occaſioned by its having been too long on board, and not by any defect in the ſhip, or by her being ſtranded.—Lord *Kenyon*, after ſtating the evidence to the jury, told them, that if they ſhould think that the captain and crew acted *bonâ fide*, and that the ſhip was run on ſhore from neceſſity, a further queſtion would ariſe upon the conſtruction of the memorandum, which, like the policy itſelf, muſt be interpreted by the uſage of merchants.—It being then ſignified to his lordſhip, by the merchants in court, that there was no uſage upon the ſubject, and that the queſtion, never having before occurred, was then for his deciſion; he proceeded to obſerve, "That the general mode of conſtruing deeds to which there are exceptions, was, to let the exception control the inſtrument as ar as the words of it extend, and no farther; and then, upon the caſe being taken out of the letter of the exception, the deed operates in full force; that, agreeably to this rule, it ſeemed to him that the ſtranding of the ſhip put fiſh in the ſame ſituation as any other commodity not mentioned in the memorandum, and the underwriters were liable for all damage ſuſtained by it; for otherwiſe there would be a very conſiderable difficulty in aſcertaining how much of the loſs aroſe from the perils inſured againſt, and how much from the periſhable nature of the commodity, which was the very thing the memorandum was intended to prevent."—But a verdict was given for the defendant, on the ground that the ſhip had been run on ſhore fraudulently.•

This revived lord C. J. *Ryder's* doctrine in *Cantillon* v. *Lond. Assur.*

The above opinion of lord *Kenyon* is conformable to that of Sir *Dudley Ryder*, in the case of *Cantillon* v. *Lond. Assurance* (*a*). It does not however appear by the note of the case, that any of the decisions subsequent to that case, were cited upon that occasion. Indeed it would seem, from the manner in which lord *Kenyon* delivered his opinion, that none of them had been mentioned; and as the defendant obtained a verdict upon another ground, the opinion delivered at the trial never became the subject of any further discussion.

The next case upon this subject came before the court of King's Bench in 1792, and there it was determined, that if a mob of riotors board a ship, and oblige the captain to sell a quantity of corn at an inferior price; the loss upon this is not in nature of a general average.—But if, in consequence of this boarding, the ship be stranded, and a quantity of corn be lost; this is a loss by *stranding* within the memorandum, for which the insured may recover upon a count applicable to such loss.

Nesbit v. *Lushington*, 4 T. R. 783.

A mob of rioters board a ship, and oblige the captain to sell a quantity of corn at an inferior price; the loss upon this, is not in nature of a general average.—If, in consequence of this boarding, the ship be *stranded*, and a quantity of corn be thereby lost, this is a loss by stranding within the memorandum; but the owner can only recover for it, upon a count for a loss by *stranding*.

An insurance was made on a cargo consisting of *wheat* and coals from *Youghall* to *Sligo*. The ship was forced by stress of weather into *Elly Harbour*, in *Ireland*, and there happening to be then a great scarcity of corn at that place, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove upon a reef of rocks, where she was stranded, and they would not leave her till they obliged the captain to sell all the corn, except about ten tons, at a certain rate. The ten tons were, however, spoiled, in consequence of the stranding, and obliged to be thrown overboard. The ship afterwards arrived at *Sligo* with the coals, which were but a small part of the cargo.—There were two counts in the delaration, one alledging the loss to have been by the *detention of certain people*; the other by *pirates*; but no count for a loss by *stranding*.—The insured never abandoned; and, as the cargo produced three-fourths of its original value, there could be no total loss. There

(*a*) Sup. 223.

was, however, a verdict for the plaintiff, as for a total loss.—Upon a motion to set aside this verdict, it was contended on the part of the insured, that as the captain was obliged to let the people take the corn, to induce them to spare the rest of the cargo, this was a *general average*, and within the exception in the memorandum But, even supposing this not to be a general average, yet, that the meaning of the memorandum must be confined to the sort of damage which is naturally incident to the commodities there specified, being of a perishable nature, and liable to a peculiar species of deterioration, not common to other articles; and that a loss by irresistable force, to which any other goods were equally liable, could never be within the meaning of the memorandum, which was to prevent disputes in these articles subject to heat and putrefaction.—But the court determined that the plaintiff could not recover in this action; because the loss upon the corn which was *sold*, could not be imputed to the *stranding*; and, as to the ten tons thrown overboard, though that was a loss occasioned by the stranding, yet the plaintiff could not recover for it, because there was no count in the declaration applicable to such a loss.—Lord *Kenyon* said, "That if a partial loss could have been recovered upon this policy, the plaintiff might have recovered for the loss by *pirates*. But as this was a policy on *corn*, the underwriter was liable for no average, unless general, or the ship were stranded; that this was not a *general average*, because the whole adventure was never in jeopardy; for the persons who took the corn, intended no injury to the ship, or any other part of the cargo but the corn; and therefore the owners of the corn could never have called on the other owners to contribute, as upon a general average; that the meaning of the memorandum was, that as it might be difficult to ascertain whether a damage to the articles enumerated in it arose from accident, or the nature of the articles themselves, this memorandum was inserted in all policies to prevent disputes, by providing that the insurer should not pay any average on those articles, unless general, or the ship were stranded; that when the ship is stranded, the underwriters agree to ascribe the loss to the

The meaning of the memorandum.

the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained."—Mr. Justice *Buller* agreed, "that there could be no general average, for the reasons already given. And, as to the stranding, he said the insured were entitled to recover, *for any loss occasioned by stranding, provided it were an immediate and direct consequence of the stranding* (a); and therefore the loss of that which was thrown overboard being ascribable to the stranding, and being a direct and immediate consequence of the peril insured against, might have been recovered, had there been any count in the declaration, applicable to a loss by stranding. But that the loss upon the corn *taken by the rioters*, was not the *consequence* of the stranding, but the rioters took possession of the ship, in order to get at the corn; and this was the *cause*, and not the consequence of the stranding."

If the ship be not stranded, the insured cannot recover for any partial loss, however great, unless it be a *general average*.

In the next case which occurs on this subject, lord *Kenyon*, at *nisi prius*, adopts the principle of the cases of *Mason* v. *Skurray* (b), and *Cocking* v. *Fraser* (c); namely, that, in the case of any of the enumerated articles, where the ship has not been stranded, the insured cannot recover for any partial loss, however great, which is not of the nature of a *general average*; and that, in such case, he can only recover as for a *total loss*; and then the voyage must either have been lost, or the goods *wholly destroyed*.

M'Andrews v. *Vaughan*, at N.P. after Mich. 1793. *Park* 114.

A cargo of fruit is captured and re-captured, and brought to the port of destination, but damaged 80 *per cent.* by the delay. As there was neither a *stranding*, nor a total loss by the capture, the insurer is not liable, either to a partial, or a total loss.

That was an insurance on *fruit* from *Lisbon* to *London*. It appeared that the ship was captured, recaptured, and brought into *Portsmouth*, from whence she afterwards came to *London*; that the cargo, in consequence of the length of the voyage, occasioned by the capture, had sustained damage to the amount of 80 *per cent.*; that the insured never heard of the capture, till the ship was safe at *Portsmouth*, and then offered to abandon.—Lord *Kenyon*,

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(a) This doctrine is conformable to the sentiments of lord *Mansfield* in the cases of *Wilson* v. *Smith*, sup. 224. and *Cocking* v. *Fraser*, sup. 227. But since the case of *Burnett* v. *Kensington*, which will be cited presently, that doctrine has been quite exploded.——(b) Sup. 226.——(c) Sup. 227.

yon, who tried the cause, said,—"As there has been no *stranding*, there cannot be a recovery for a partial loss. The question then is, Whether the insured can recover as for a *total* loss? Had the plaintiff *heard* of the capture only, he might have abandoned: But he hears nothing of the accident, till the ship is in safety. The cargo arrives at the port of destination; and though it is good for very little; yet it has invariably been held, that the voyage must either have been lost, or the cargo, (if it be one of the articles mentioned in the memorandum), must be wholly and actually destroyed, to entitle the insured to recover."—The plaintiff was nonsuited.

To recover in such case as for a total loss, the voyage must either have been lost, or the goods wholly destroyed.

It may not be improper here to observe, that the concluding words of the learned judge, taken in an unqualified sense, might mislead persons not familiar with the law of insurance. Under the memorandum, the insured would be entitled to recover for *any partial loss*, however small, of the nature of a *general average*: For instance, he might recover his proportion of the salvage to the recaptors. His Lordship's words ought therefore to be understood, as he must have intended them, to relate only to the case before him, where the question was, whether the insured could recover for the particular damage done to the fruit, in consequence of the *length of the voyage*, occasioned by the capture, which was a partial loss, not of the nature of general average.

Thus far has remained undetermined, the important question, whether the words, '*or the ship be stranded*,' make a *condition*, so as to let in the insured, upon that event happening, to prove his whole partial loss upon any of the enumerated articles, from whatever cause such loss may have arisen, as it was originally held by Sir *Dudley Ryder* (*a*); and afterwards by lord *Kenyon* (*b*):— Or whether those words amount only to an *exception*; so as to confine the liability of the insurer to partial losses arising from the stranding only; according to the opi-

It is now settled, that if the ship be stranded, the insurer is liable for any partial loss in any of the articles, though it did not arise from the stranding, but from some other cause.

(*a*) In *Cantillon* v. *Lond. Assur.* sup. 223.——(*b*) In *Bowring* v. *Elmslie*, sup. 228. and *Nesbitt* v *Lushington*, sup. 230.

nions

nions of lord *Mansfield* (a), and of Mr. Justice *Buller* (b).—But at length, in the following case, this question came directly before the court of King's Bench; and it was there, after solemn argument, and upon great consideration, determined, that a stranding destroys the exception in the memorandum, and lets in the general words of the policy; and that, therefore, where the ship has been stranded, the insurer is liable for any partial loss sustained by any of the enumerated articles, though such loss did not arise from the stranding, but solely from some other cause.

Burnet v. *Kensington*, 7 T. R. 210. S. C. Esp. Rep. 416.

A ship, with a cargo of fruit, strikes on a sunken rock, and receives great damage, so that it becomes necessary to run her on shore, to save both ship and cargo. The ship, however, arrives at her port of destination, but with the fruit greatly damaged, not by the *stranding*, but solely in consequence of the striking on the rock—The insurer is liable for this partial loss, though it did not arise from the stranding.

That was the case of an insurance on *fruit* on board the *Commerce*, 'At and from *Malaga* and *Velez Malaga* 'to *Plymouth* and *Portsmouth*.'—The plaintiff declared as for a total loss of the goods insured, by the perils of the sea, and the *stranding of the ship*.—It appeared that the ship, on the 29th of *January* 1795, in the course of the voyage, arrived off *Scilly*, and that morning struck upon a sunken rock, about three leagues from the island; that she did not remain on the rock; but, in consequence of the striking thereon, several of her planks were started, and the water immediately flowed into the hold and over the cargo, and continued to increase in the hold for about three hours; that about noon the same day, the ship was stranded upon the beach at *Scilly*, by the captain, under the directions of the pilot from the island, in order to save the ship and cargo; that the ship continued some time on the beach, during which the water flowed in and over part of the cargo, at the return of the tide; that she was afterwards got off, proceeded on her voyage, and arrived at *Plymouth* on the 24th of *February* with the greatest part of her cargo; that the fruit was very much damaged, and a small part of it left at *Scilly*, being intirely unfit for use; that the ship received no damage in consequence of the *stranding*; but the damage she received was entirely from the *rock* on which she struck,

(a) In *Wilson* v. *Smith*. sup. 224. and *Cocking* v. *Fraser* sup. 227.——(b) In *Nesbitt* v. *Lushington*, sup. 230.

which

which alone occasioned the damage to the cargo, partly by the water which flowed into the ship previous, partly by that which flowed in subsequent, to the stranding.— There was a verdict for the plaintiff, subject to the opinion of the court upon the above facts.—The only question was, whether, as the ship was in fact stranded in the course of her voyage, the insurers were liable for a partial loss, arising solely from the perils of the sea, and not from the act of stranding.—The court, after two arguments, were of opinion that the plaintiff was entitled to recover the whole partial loss.—Lord *Kenyon* said, —" The words of the policy are general, including all cases: Then comes the memorandum, " corn, " fish, salt, fruit, flour, and seed, warranted free from " average, *unless general* or *the ship be stranded.*" This, therefore, lets in a general average; and I do not know how to construe the words grammatically, but by saying, that *if the ship be stranded, that destroys the exception, and lets in the general words of the policy.* If a general provision be made in any instrument, and it be there said, that certain things shall be excepted, unless another thing happen; if that other thing do happen, it destroys the exception, and gives effect to the general operation of the deed.—Without entering into the reasons for introducing this exception, on the grammatical construction of the whole, I have no doubt.—The case of *Cantillon* v. *Lond. Ass. Comp.* as stated by Sir *Fletcher Norton*, in 3 *Bur.* 1553 (*a*), which is better authority than *Magens*, is a judicial decision on the very point, by a jury of merchants, under the directions of Lord C. J. *Ryder*, who held that the words, " *or the ship be stranded,*" amounted to a *condition*, and that, by the ship's being stranded, the insured was let in to claim his whole partial loss. This decision was acquiesced in at the time, and the insurance companies altered the form of their policies in consequence of it. Generally speaking, if I were bound to decide between the opinions of lord *Mansfield* and lord C. J. *Ryder*, perhaps I should be guided by the former in preference to the latter: But what fell from him in

If the ship be stranded, that destroys the exception, and lets in the general words of the policy.

(*a*) Sup. 223.

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Lord *Mansfield's* doctrine, in the case of *Cocking* v. *Fraser*, questioned.

the case of *Wilson* v. *Smith* (*a*) was only an *obiter dictum*; and I confess it does not bring conviction to my mind. With regard to *Cocking* v. *Fraser* (*b*), it is sufficient to say, that there was no stranding in that case: What was there said was likewise an *obiter dictum*; and I cannot subscribe to the opinion there given, that '*if the commodity specifically* '*remain, the underwriter is dicharged.*' But if fish be deteriorated by the accident of *stranding*, the underwriters would be answerable, though the article specifically remained. If it had been intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty; they would have said, unless for losses *occasioned* by stranding: But, in the body of the policy, they have insured against all losses from the causes there enumerated, which include stranding; and then follows this memorandum, the evident meaning of which is, 'free from average unless ge-'neral, or *unless* the ship be stranded:' So that, if the ship be stranded, the insurers say they will be answerable for an average loss. That appears to me to be the true sense and grammatical construction of the policy; and thinking so, I am bound to give the same opinion I formerly gave (*c*), not because I gave that opinion before, but because I am convinced by the reasoning that led to it,"—Mr. Justice *Ashhurst* said,—"As it is difficult, where a ship is stranded, to determine whether or not the damage to the cargo arose from the stranding, or in what degree it was imputable to that cause, this memorandum seems to have been introduced to avoid that inquiry, and that, when the ship has been stranded, the insurers consent to ascribe the loss to that cause, This construction, which has already been put on the memorandum in the cases of *Cantillon* v. *Lond. Ass. Comp.* and *Nesbitt* v. *Lushington*, will prevent endless litigation."—Mr. Justice *Lawrence* said,—"Although the jury found that part of the

(*a*) Sup. 224.——(*b*) Sup. 227. Vid. sup. 228. note (a). ——(*c*) In the cases of *Nesbitt* v. *Lushington*, sup. 230. and *Bowring* v. *Elmslie*, sup. 228.

damage

damage happened *after* the ftranding; it is alfo found as a fact, that the fhip received no damage *in confequence of the ftranding*, and if the fhip had not been ftranded, both the fhip and cargo would have been totally loft. The queftion, therefore, is, whether an average lofs is payable to any amount, however great, *from whatever caufe it may arife*, if the fhip happen to be ftranded. If the exception in the memorandum be confined to loffes *arifing* from the ftranding, it muft be from this confideration, that otherwife it might be a temptation to the mafter to ftrand the fhip, if any trifing damage were done to the cargo, to enable the infured to recover.— However, where the words of the policy are inaccurate, and where there are inconveniences attending each conftruction of it, if the cafe has ever been decided, I think we ought to be guided by it. In the cafe of *Wilfon* v. *Smith*, lord *Mansfield* feemed to think, that the word "*unlefs*" did not create a *condition*; but that the meaning of the exception was, that the underwriters fhould only be liable for a partial lofs in two cafes, one where there is general average, the other where the damage *arifes* from the ftranding. But, in fo confidering it, lord *Mansfield* went beyond the facts of the cafe then before the court; for there the queftion was, whether the infured was entitled to recover a partial lofs from the circumftance of his being intitled to a general average: Now the words of the exception are not "warranted free from average, *unlefs there be a general average*, or *unlefs* the fhip be ftranded;" but warranted free from average, "unlefs general, or the fhip be ftranded." Therefore, as there is a difference in the expreffion of thefe two exceptions, perhaps it may be confidered as a *condition*, as applied to the *ftranding*, though it be not a condition, as applied to the *average*. If fo, then there is only one authority in point, that of *Cantillon* v. *Lond Affurance*, in which cafe it was confidered, that the ftranding was a condition, and that the underwriters were liable on the happening of that condition. Therefore, as the very queftion has been once decided, I think it ought to govern our decifion in this cafe, efpecially as the queftion

arises on the construction of an instrument so inaccurately penned as a policy of insurance."

If, by the perils of the sea, any of the enumerated articles be so damaged as to be of no value, though they remain in specie, this will be a total loss, against which the memorandum will not protect the underwriters.

Dyson and others v. *Rowcroft*, 3 *Bos. & Pul.* 474.

A ship, with a cargo of *fruit*, is forced by stress of weather to put into a port out of the course of her voyage, and there finds the fruit spoiled by the sea water and rotten, and it becomes necessary to throw it overboard:—This is a total loss.

As where a cargo of *fruit* was insured from *Cadiz* to *London*, with the usual memorandum in the policy.—The ship sailed on the 15th of *February* 1802, but was forced by storms and tempestuous weather, first to put into *Palma*, and afterwards into *Santa Cruz*, where she arrived the 3d. of *May*. There it was found that the fruit had received so much damage from the sea water that it was rotten, and stunk to so great a degree that the government there prohibited the landing of it; and it was necessarily thrown overboard. The ship was also so much damaged as to be unable to proceed on the voyage, and was necessarily sold.—Upon this case the court determined that the insured were entitled to recover as for a total loss.—Lord *Alvanley* said:—"The meaning of the memorandum is, that, unless the consequence of the damage be the total loss of the commodity, the underwriter does not agree to be answerable: Bnt if the commodity be totally lost to the insured, he undertakes to pay. Cases like the present are generally suspicious. If the voyage be protracted, deterioration necessarily takes place; and it becomes the interest of the insured to turn this into a total loss. We ought, indeed, to look at this case with suspicion, where there is so much temptation to throw the cargo overboard. But here there was a manifest necessity for doing so. Had it not been thus annihilated, it would have been annihilated by putrefaction. The case of *Cocking* v. *Fraser* (*a*) was the only thing that raised any doubt in my mind. But the authority of that case is much shaken by the observations of lord *Kenyon* in *Burnet* v. *Kensington* (*b*).—Mr. Justice *Heath* said:—"As the cargo was necessarily thrown overboard, the case does not fall within the ex-

(*a*) Sup. 227.—(*b*) Sup. 234.

ception

ception in the memorandum, and is not governed by the case of *Cocking* v. *Fraser*. Had it been the same in circumstances as *Cocking* v. *Fraser*, it would have been necessary for us to consider how far that case has been impeached by the observations of lord *Kenyon* in *Burnet* v. *Kensington*."—Mr. Justice *Chambre* said:—"The cargo being necessarily thrown overboard, and the ship being unable to proceed, this made a complete end of the voyage: And though the cargo might be said to exist in *specie*, yet, in value, it did not exist at all. By the memorandum the underwriters protect themselves against partial damages; because the enumerated articles being perishable in their nature, it would be impossible to ascertain with exactness what part of the loss arose from the nature of the commodity, and what from sea-damage. If ever there was a case of total loss, it certainly is the present."

Whether the memorandum exempts the insurer from the *total loss* of an *entire* individual.

Notwithstanding the number of cases which have been decided upon the construction of the memorandum, it still remains a question, whether the losses from which the insurer is exempted by it, comprehend the *total loss* of an *entire individual*, as well as a partial injury to the *whole* of the species of goods which are exempted by the memorandum from small average losses: As if out of 101 hogsheads of sugar of equal value, five are so completely spoiled in the voyage as to be worth nothing, and therefore *totally lost*.—If this loss be calculated upon the whole 101 hogsheads, it will not amount to five *per cent*.—In such a case, it has been thought, that the insurer would be protected by the memorandum, (*a*). As the question has never, I believe, been directly agitated in our courts, I will not presume to say how it ought to be decided.

Meaning of the word *stranding*.

Dobson v. *Bolton*, at G. H. after Easter 1799.

As to what shall amount to a *stranding*, within the meaning of the memorandum, two cases have occurred where that was the principal question. In the first of these it appeared that a ship having run on some wooden piles, four feet under water, erected in *Wisbeach* river,

(*a*) Vid. 1 *Mag*. 73. 2 *Bur*. 1170.

about

about nine yards from the shore, but placed there to keep up the banks of the river, and lay on these piles till they were cut away.—Lord *Kenyon* told the jury that this was a stranding, within the meaning of the memorandum, so as to let in the insured to claim a partial loss on corn.

Baring v. *Henkle*, before lord *Kenyon*, at G. H. *July* 13th 1801.

A ship, in the river, is run foul of by two other vessels, and driven aground, where she remains an hour:—This is not a *stranding*.

The other case was an insurance on *fruit*, on board the *San Pietro*, bound to the port of *London*. The ship arrived in the *Thames*; but upon her coming up to the *Pool*, which was full of vessels, one brig ran foul of her bow, and another of her stern, in consequence of which she was driven aground, and continued in that situation an hour, during which period several other vessels ran foul of her.—To prove that this was a *stranding*, within the meaning of the memorandum so as to entitle the insured to recover for a partial damage to the fruit, it was contended that, though every *touching* of the ground could not be deemed a stranding; yet, that a ship's taking the ground, and *remaining* there a considerable time, must necessarily be considered as a stranding, whether it proceeded from the violence of the wind, or from an accident, as in this case; for a stranding did not depend on the nature of the ground on which the vessel was cast, or the means by which she was thrown there, nor the length of time she remained in that situation.—On the other side it was insisted that the memorandum would be of little use, and the situation of the insurer precarious indeed, if this could be considered as a stranding; that, on the contrary, that only could be demeed a stranding, within the meaning of the memorandum, where a ship was either cast on shore by the violence of the winds and waves, or run aground to to avoid a greater danger.—Lord *Kenyon* told the jury that unskilled as he was in nautical affairs, he thought he could safely pronounce this to be no stranding.—The jury were of this opinion, and found a verdict for the defendant.

Sect.

Sect. IV.

For what Loſſes the Owners and Maſter of the Ship are liable.

THERE are certain injuries and loſſes to which goods on ſhip-board are expoſed, which cannot properly be ſaid to ariſe from the perils of the ſea; but are imputable to the owners of the ſhip, or to the negligence or miſconduct of the perſons employed by them on board. In all ſuch caſes, the owners, in reſpect of the freight, are anſwerable to the owner of the goods for ſuch loſs or damage, ſubject, however, to certain regulations and reſtrictions which we ſhall preſently have occaſion to notice. Loſſes not ariſing from the perils of the ſea, and for which the owners are liable.

Thus, if any loſs or damage happen to the goods, from any fault or defect of the ſhip, not ariſing from ſea damage or from any accident or misfortune in the voyage, but from ſome latent defect before ſhe ſailed; the owner of the goods has his remedy againſt the owners of the ſhip, for ſuch loſs or damage; and the inſurer, in ſuch caſe, is not liable, becauſe, in every contract of inſurance, there is an implied warranty, that the ſhip is ſea-worthy; and if it appear that ſhe was not ſo, the contract is void (*a*). As damage happening by the fault of the ſhip.

In many caſes, the maſter alſo, as well as the owners, is anſwerable; for though his appointment gives him no property in the ſhip, either general or ſpecial, yet it is the policy of the law to hold him reſponſible for all loſs or damage that may happen to the goods committed to his charge, whether it ariſe from the negligence, ignorance, or wilful miſconduct of himſelf or his mariners, or any other on board the ſhip. As ſoon, therefore, as goods are put on board, they are in the maſter's charge; and he is bound to deliver them again in the ſame ſtate in which they were ſhipped; and he, as well as the owners, In what caſes the maſter alſo is liable.

(*a*) Vid. *Val.* tom. 1. p. 654. *Pothier*, h. t. n. 66. *Emerig.* tom. 1. p. 580. ſup. ch. 5. ſ. 1.

is answerable for all loss or damage they may sustain, unless it proceed from an inherent defect in the article, or from some accident or misfortune, which could not be foreseen or prevented. The master, therefore, as well as the owners, is liable for all injuries occasioned by bad stowage, or the goods being exposed to wet; for losses by theft or embezzlement of the mariners on board (*a*); and also for damage done by rats, unless it appear that all necessary precautions were used to prevent it (*b*).—This is the rule of the marine law (*c*), and with it agrees the common law of *England*, which considers the owners, as well as the master, as common carriers, and answerable for all losses, except such as arise from the act of God, the king's enemies, or the perils of the sea. This is strongly exemplified in the following case.

They are answerable for loss or damage occasioned by bad stowage, wet, theft, embezzlement, rats, &c.

Morse v. *Slue*, *Molloy*, b. 2. c. 2. s. 1. S.C. 1 *Vent.* 190. 238. T. *Ray.* 220 1 *Danv.* 12. 3 *Keb.* 72. 112. 135.

A number of persons under pretence of being a press gang, enter a ship and carry away goods: The master is answerable, though he had taken all precautions.

A quantity of goods were sent on board a ship, and after they were stowed, a number of persons, under pretence of being press-masters, entered the ship in the night, and robbed her of the goods.—An action being brought against the master, by the owner of the goods, he contended that no negligence was imputable to him; that he had a sufficient guard on board, that the goods were all locked up under the hatches, and that the thieves came as press-masters, and by force robbed the ship; that this was that sort of *vis major*, which he could not resist; and that though he was master of the ship, yet he had no share in her, and was only in nature of a servant, acting for a salary.—But the court determined that the plaintiff was intitled to recover:—For the master, at his peril, must see that all things are forthcoming that are delivered to him, whatever accident may happen, the act of God, or the king's enemies, and the perils of the sea only excepted: But for fire, thieves, and the like, he must answer, as a common carrier, and though he

(*a*) *Mal.* lex merc. 117, 118. *Le Guidon*, c. 5. art. 5. and 6. *Cleirac*, p. 254. *Roc.* n. 49. *Emerig.* vol. 1. p. 377.——(*b*) *Emerig.* vol. 1. p. 377.——(*c*) Vid. *Roc.* n. 49. *Cleirac*, p. 254. *Le Guidon*, c. 5. art. 5. and 6. *Molloy*, b. 2. c. 1. s. 5. and c. 2. s. 2.

has

has no share in the ship, and only receives a salary, yet he is *a known public officer*, whom the law looks upon as answerable; and the owner of the goods has his election to charge either the master or the owners, or both, at his pleasure; though he can have but one satisfaction.

The common law carries the principle of responsibility farther than the marine law.

I take this case from *Molloy*, though it is reported in various other books, because he himself appears to have argued it. It seems to carry the principle of responsibility farther than it is carried by the marine law. Simple theft or embezzlement by persons on board, not being attributable to accident, is not deemed a peril of the sea (*a*). But *robbery* is a peril which cannot be foreseen or prevented (*b*). An insurer is not answerable for simple theft by persons on board the ship; because it may be reasonably attributed to the want of proper vigilance in the master: But he is liable for a robbery, committed with violence, by persons not belonging to the ship; for the word *thieves* in the policy means thieves *assailing from without*, and not thieves among the crew (*c*). Robbery, in this sense, is a species of piracy; indeed the only difference between robbery and piracy is, that the one is generally understood to be a plundering on land, the other a plundering at sea. *Inter piratam et latronem nulla alia est differentia, nisi quia pirata depredator est in mari* (*d*).—The robbery mentioned in the above case, unquestionably amounted to piracy, according to the opinion of lord *Kenyon* in *Nesbitt* v. *Lushington* (*e*), though it was committed in the river *Thames*; and this, by the marine law, is a peril of the sea: But the court, assimilating the case of a master of a ship, to that of a common carrier, held it no excuse that the defendant had taken all proper pecautions for the safety of the goods, and that the robbery had been committed by persons *assailing from without*, and with a force which he was unable to resist.—It is to be observed, however, that it

(*a*) *Furtum non est casus fortuitus. Roc.* n 42.——(*b*) *Latrocinium fatale damnum, seu casus fortuitus est. Roc.* n. 43.——(*c*) *Malyne*, c. 25. *Beawes* 313, 5th ed.——(*d*) *Santerna*, p. 4, n. 50.——(*e*) Sup. 230.

appears from the report of this case in *Ventris*, that lord C. J. *Hale*, in delivering the opinion of the court, said, "that this case was not to be measured by the rules of the admiral law; because the ship, which at the time of the robbery, lay in the river *Thames*, was *infra corpus comitatus*; and therefore the case did not differ from that of a common hoyman (*a*)."

If a loss happen in the shipping, or landing of goods, by the fault of the master or crew, or of the ship's tackle, the owners and master are each liable.

If goods are delivered to the master on shore, he is answerable for them as much as if delivered on board the ship (*b*). So is he answerable by the general law for the safety of the goods from plunder or damage, while they are in his boats or barges to be put on board or landed; because those boats or barges are considered as attached to, and making a part of the ship. And if any loss or damage happen in the shipping or landing of the goods, through the fault of the master or his crew, or the defect of the ship's tackle, the master and the owners are respectively answerable. If the loss or damage, in such case, be not imputable to the master or crew, or to the defect of the ship's tackle, then the insurer is answerable (*c*). But till the goods are safely landed and delivered to the consignee, the liability both of master and owners continues (*d*).

But now, by 7 G. II. c. 15. the owners shall only be liable to the value of the ship and freight for any act done by the master or mariners.

At common law, this liability of the owners and master of the ship extended to the full amount of the loss; and the *master's liability* still remains the same. But it was found that the liability of the owners of ships to *the amount of the full value* of goods put on board, and made away with by the master or mariners, very much tended to discourage persons from adventuring their fortunes as ship-owners; therefore the stat. 7 *G*. II. *c*. 15. provides, 'That no owner of any ship shall be liable for

(*a*) Vid. 1 *Vent*. 238.——(*b*) *Nauta qui recepit à Titio merces in littore maris, si ili merces perierint, periculo ipsius nautæ pereunt, tanquam si essent in navi receptæ et hoc procedit, quia sufficit nautam sic recepisse, & propterea in ejus periculo sunt. Roccus de navib.* n. 88.——(*c*) *Le Guidon*, c. 5. art. 7. Vid. Laws of *Oleron*, art. 10. Laws of *Wisbuy*, art. 49. *Emerig*. vol. 1 p. 678. ——(*d*) *Emerig*. vol. 1. p. 679.

'any

'any loss or damage occasioned by any embezzlement, 'secreting, or making away with any gold, silver, jewels, 'or other merchandize on board, or for any act, matter, 'damage, or forfeiture, done or incurred, by the master 'or mariners, without the privity or knowledge of the 'owners, further than the value of the ship, and the 'freight due for the voyage; and where there are seve- 'ral proprietors of the goods on board, and the value of 'the ship and freight be insufficient to compensate for 'the loss of each, they shall receive an average in pro- 'portion to their respective losses.—And they, as well 'as the owners of the ship, may exhibit a bill for a dis- 'covery of the amount of the loss, and the value of the 'ship, and for a distribution thereof; and if such bill 'be exhibited by the owners, they shall annex an affidavit 'that they do not collude with the defendants.—But it 'is provided, that this act shall not lessen the remedy 'against the master and mariners, in respect of such em- 'bezzlement, &c.'

The 26 *G.* III. c. 86. limits the liability of the owners to the value of the ship and freight, though the master or mariners be not privy, and they are exempt from loss by fire.

As this act extends only to cases where the embezzlement, &c. is committed by the master or mariners, it was not found a sufficient protection to ship-owners; and therefore the stat. 26 *G.* III. c. 86. recites, "That all masters and owners of ships are, by law, respectively liable to answer for the full value of all goods shipped on board, notwithstanding such goods be lost by robbery, fire, or other accident, (other than the king's enemies, the perils of the seas, or the act of God), or unless the master or some of the ship's company be privy to such robbery, in which case alone the responsibility of the owners is, by the stat. 7 *G.* II. c. 15. limited to the value of the ship and freight." It then enacts, 'That no 'owner shall be answerable for any loss or damage by 'reason of any robbery, embezzlement, &c. of any goods 'on board, or for any act, &c. done without their pri- 'vity or knowledge, beyond the value of the ship and 'freight, although the master or mariners shall not be 'concerned in the robbery, &c.; nor answerable for any 'loss or damage to goods occasioned by fire on board; 'nor shall the master or owners be liable for the loss of

Neither the owners or master liable for plate jewels, &c. unless inserted bill of lading

'any gold, silver, jewels, &c. by means of any robbery, '&c. unless the shipper insert in the bill of lading, or 'otherwise declare, the quality and value thereof.'

From these parliamentary regulations it appears, that though the responsibility of the master, except in the instance mentioned in the last clause, remains the same as it was before; yet, that of the owners is limited to the value of the ship and freight, in all cases of theft, embezzlement, &c. without their privity, whether by the crew, or by strangers; and that they are wholly exempt from all losses occasioned by fire.

But the insurer as well as the owners of the ship is liable for external thefts.

But though the owners are responsible to the amount of the value of the ship and freight, for losses occasioned by external thieves; yet, under the policy, the insurers are also liable (*a*); and therefore, in such cases, the proprietor of the goods, or the insurers in his name, may recover against the owners.

Sect. V.

What shall be the Duration of the Risk.

pened in the course of the voyage described in the policy, and during the continuance of the risk insured against (*b*).

Every voyage insured must have a *terminus à quo* and a *terminus ad quem*. When the insurance is for a limited time, the two extremes of that time are the *termini* of the voyage insured. When a ship is insured, both outward and homeward, for one entire premium; this, with reference to the insurance, is considered but as one voyage; and the *terminus à quo* is also the *terminus ad quem*.

(*a*) *Harford* v. *Maynard*, before lord *Mansfield* at G. H. Hil. vac. 1785. *Park* 25.——(*b*) *Roccus*, h. t. n 18.

For

For the sake of perspicuity, we will consider the duration of the risk, 1. With reference to insurances *upon goods*; 2. *Upon the ship*; and 3. *Upon freight*.

1. *Upon Goods*.

The time of the commencement and end of the risk *on goods* in other countries.

By the ordinances of *France*, and of most other countries, it is provided, that if the time of the risk be not regulated by the contract, it shall commence, *as to goods*, from the time they are put on board the ship, or put into barges, to be conveyed on board, that is, from the moment they leave the shore; and it continues till they are safely landed at their place of destination. And the insurer does not only run the risk while the goods are in the ship named in the policy, but also in the boats or lighters that shall be employed in bringing them on board and carrying them on shore. The reason assigned for this is, because the perils of the sea commence from the moment the goods are on the water, and continue till they are landed (*a*).

In *England*.

In our policies, the words usually employed to express the commencement and end of the risk on goods are these,—'Beginning the adventure upon the said goods 'and merchandizes *from the loading thereof aboard the said 'ship*, and so shall continue and endure until the said ship 'with the said goods, shall be arrived at [her 'port of delivery], *and until the same be discharged and 'safely landed*.'—This clause is often varied by the agreement of the parties. Sometimes the risk on goods is made to commence from the loading thereof on board the ship specified at a particular place, in which case the policy will attach only upon such goods as are then put on board, and not upon goods shipped elsewhere, though they were the very goods meant to be insured, and were on board at the place specified.

If goods are to be shipped at a particular place, the policy will not cover goods shipped elsewhere, though they are the same goods.

Thus:—A policy was effected 'on goods on board the '*Chesterfield*, and on the ship, at and from the coast of

Robertson and another v. *French*, 4 *East* 130.

A ship and goods are insured, 'from the 'coast of *Brazil* 'to the *Cape of* '*Good Hope*, be-

(*a*) Vid. 1 *Mag*. 44. *Emerig*. tom. 1. p. 14. Ord of. *Louis* XIV. tit. *Contrâts à la grosse*, art. 5. Vid. *Pothier*, h. t. p. 63.

ginning the adventure on the goods from the loading thereof *on the coaſt of Brazil*, from the 17th of *September*; and upon the ſhip *in the ſame manner*.' The cargo is taken on board at the *Cape*:—The policy never attaches on theſe goods, though they are the goods meant to be inſured, and are on board after the 17th of *September* on the coaſt of *Brazil*.—And the policy not attaching on the goods, does not attach on the ſhip.

'*Brazil*, and after the 17th of *September* 1800; and 'upon the ſaid ſhip *in the ſame manner*; and ſo ſhall 'continue upon the ſaid ſhip during her abode there, 'and until the ſaid ſhip and goods ſhall be arrived at '*Simon's Bay* or *Table Bay*; and upon the ſhip and goods 'until the goods be there diſcharged.'—The goods meant to be inſured were put on board at the *Cape of Good Hope*, and the ſhip went from thence on the 17th of *February* 1800, and arrived on the coaſt of *Brazil* on the 30th of *May*, where ſhe remained till *November*, when, on ſuſpicion of illicit trading with the enemy, ſhe was ſeized by ſome *Britiſh* ſhips of war, and carried again to the *Cape* with the original cargo on board, where the captors libelled againſt her in the vice-admiralty court. On intelligence of theſe circumſtances the inſured abandoned; and, in an action upon the policy, declared upon a loſs by the arreſt and reſtraint of the king's ſhips.—The underwriters objected that the adventure on the cargo being, by the terms of the policy, made to commence from the loading of the goods *on the coaſt of Brazil*, an event which never happened, in as much as the goods were not loaded there, but at the *Cape of Good Hope*, the policy never attached on the cargo. They likewiſe objected that the adventure on the ſhip being, by the terms of the policy, made to begin '*in the ſame manner*' with that on the goods, could of courſe have no commencement, if that on the goods never attached.—On the part of the plaintiffs it was contended that either the words, '*from the loading thereof aboard the ſaid ſhip*,' ought to be rejected; or, that theſe words were to be underſtood to mean, from the time of the ſhip's being, *with the goods on board her*, or *having the goods on board her*, on the coaſt of *Brazil*.—The court determined that the riſk could only commence on goods and the ſhip after a loading of goods had taken place on the coaſt of *Brazil*; and that, as that event had never taken place, the policy never attached either on goods or ſhip.—Lord *Ellenborough*, in delivering the opinion of the court, ſaid, that the words, '*on the coaſt of Brazil*,' having an apparently ſignificant meaning, and referring diſtinctly to an act to be done at a given

a given place, could not be rejected or severed from the words, '*from the loading thereof aboard the said ship,*' with which they were necessarily united and connected in sense.

Under the usual form of our policies it is plain that the risk does not commence until the goods are actually on board the ship; and therefore the insurer is not answerable for any loss or damage which may happen to them, while they are on their passage to the ship. And it may be laid down as a general rule, that the risk on goods continues no longer than they are actually on board the ship mentioned in the policy, or in boats for the purpose of being landed; and that if they be removed from on board that ship and landed, or put on board another ship, without the consent of the insurers, the contract is at an end, and the insurers are discharged from all subsequent responsibility.

In general, the risk continues on goods while they are on board the ship mentioned in the policy.

But to this rule there are certain exceptions, founded in necessity, which it will be proper to mention in this place.

Exceptions.

Where the ship is disabled in the course of the voyage, so as to be incapable of proceeding to her port of destination, and it becomes necessary to shift the goods insured on board another vessel, in order to be conveyed thither: In that case, though it has been thought that the insurers are thereby discharged (*a*), yet it is now clearly settled, that the risk continues, and that the insurers are liable for any loss that may happen to the goods on board the new ship (*b*).

Where the ship is disabled and the goods are put on board another vessel to be forwarded to their port of delivery.

So, if it be agreed that the goods insured may, at a particular place, in the voyage, be removed from on board the ship in which they are to be brought thither, and put on board other ships to be carried to their port of delivery; but, on their arrival at the place, there being no ships to receive them, they are put on board a *store-ship*, which is stationary there, to be kept till ships bound to their place of destination arrive: In this case,

Or, if it be agreed, that the goods shall be removed into another ship at a particular place in the voyage, and there being no ship there, they are put on board a store-ship.

(*a*) Vid. *Molloy*, b. 2. c. 7. s. 11.——(*b*) The subject of *changing the ship* has been already fully treated, sup. ch. 5. s. 2.

the

the risk continues on the goods on board the store-ship, and if they be lost on board her, the insurer is answerable. This was determined in the following case.

Tiernay v. *Etherington*, cited 1 *Bur.* 348.

Goods insured from *A.* to *B.* with liberty to put them into one or more ship or ships, at *C.* to be forwarded to *B.* their place of destination.—There being no ships at *C.* when the goods arrive, they are put on board a store-ship till ships do arrive:—The risk continues in the store-ship.

An insurance was made *on goods* in a *Dutch* ship,—'From *Malaga* to *Gibraltar*, and at and from thence to '*England* and *Holland*, both or either; the adventure to 'begin from the loading, and continue till the ship and 'goods should arrive safe in *England* or *Holland*, and be 'there safely landed.'—It was agreed, 'that upon the 'arrival of the ship at *Gibraltar*, the goods might be un-'loaded and reshipped on board one or more *British* ship 'or ships for *England* and *Holland*, and to return one '*per cent.* if discharged in *England.*'—In an action on this policy, it appeared in evidence, that when the ship came to *Gibraltar*, the goods were unloaded and put into a *store-ship*, (which it was proved was always considered as a warehouse), and that there was then no *British* ship there. Two days after, the goods on board the *store-ship*, were lost in a storm.—In an action on the policy, it was insisted for the defendant, that the insurance was only on goods on board the *Dutch* and *British* ships, and that it did not extend to the store-ship, which is considered as a warehouse at land, and so not a peril of the sea.—But it was ruled by lord C. J. *Lee*, that the plaintiff was entitled to recover;—"For," said his lordship, "in the construction of policies, the *strictum jus*, or *apex juris*, is not to be laid hold of; but they are to be construed largely for the benefit of trade, and for the insured. But it would be a strict construction to confine this insurance to the unloading and reshipping, and the accidents attendant thereon. The construction should be *according to the course of trade in this place*, where the usual method of unloading and reshipping is, that when there is no *British* ship there, then the goods are kept in store-ships. Where there is an insurance on goods on board such a ship, that insurance extends to carrying the goods on shore in a boat. So, if an insurance be on goods to such a *city*, and the goods are brought in safety to such a *port*, though distant from the city, that is a compliance with the policy, if that be the usual place to which

Policies are to be construed largely for the benefit of trade.

An insurance on goods extends to carrying them on shore.

An insurance on goods to a place means the *port* to which goods destined for that place are usually sent.

which the ships come. Therefore, as here is a liberty given of unloading and reshipping, it must be taken to be an insuring under such methods as are proper for unloading and reshipping. There is no neglect on the part of the insured, for the goods were brought into port the 19th and lost the 22d of *November*. This manner of unloading and reshipping is to be considered as the necessary means of attaining that which was intended by the policy, and seems to be the same as if had happened in the act of unshipping from one ship to another. This is not to be considered as a suspension of the policy; for as the policy would extend to a loss happening in the unloading and reshipping from one ship to another, so any means to attain that end come within the meaning of the policy."—Accordingly the plaintiff had a verdict.—A new trial was moved for; but it was refused by lord C. J. *Lee*, Mr. Justice *Chapple*, and Mr. Justice *Denison*; against the opinion of Mr. Justice *Wright*; who thought that it was a removal at the peril of the insured.

The goods are protected in lighters to any part of the port where such goods are usually landed.

But the words of the above clause shew, that the risk on goods, in *English* policies, like foreign ones, continues till they are "*discharged and safely landed*" at the port of delivery.—And the insured has a right to land them at any wharf or place, within the port, where such goods are usually landed.—For instance, all the ships laden with hemp for the port of *London*, do not land it at the custom house; but it is often carried down the river in lighters, and landed at different wharfs on each side of the river. If, therefore, a cargo of hemp be insured from a foreign port to the port of *London*, and the consignee be desirous of landing it at *Woolwich*, *Chatham*, or any other place within the port of *London*, where hemp is usually landed, it would seem that he might send it in lighters from the ship to such place under the protection of the policy.

Policies ought to be construed according to the usage of trade.

For policies of insurance ought always to be construed according to the course of trade in the place; and mistakes and doubtful passages ought to be interpreted in favour of the insured (*a*).

(*a*) 1 *Mag*. 48.

But

But though the general rule is, that the insurance on goods shall continue "*till they are discharged and safely* "*landed,*" yet it has been holden, by a very eminent and learned judge, that if the insured take goods from on board the ship in his own lighter, the insurer is discharged.

Sparrow v. *Carruthers*, at N. P. 2 *Str.* 1236.

If the owner of goods insured take them from on board the ship in his own lighter, the insurer is discharged.

Thus:—Goods were insured to *London*, "*and until the same should be safely landed there.*"—On the ship's arrival, the owner of the goods sent *his own lighter*, and received them out of the ship; but before they reached the shore an accident happened, by which they were damaged.—For this loss, an action was brought against the insurer.—On the part of the defendant, it was insisted, that the accident happening after the owner had taken the goods into his own possession, it was a loss after the insurance was ended.—To this it was answered, that if this had been an action against the master or owners of the ship, that objection would have been a good answer to it, for they were certainly discharged: But in this action it would be no answer; for it might as well be said, that during the whole voyage, the goods were in the possession of the insured, who took the ship to freight, and whose servant the master was, to this purpose, as much as the lighterman; that, in the case of ships of great burthen, which are forced to lie off, there may be a carriage of many miles in boats and lighters, and it was in the course of trade for the owner of the goods to send his lighter.—But lord C. J. *Lee* held, that the insurer was discharged.—He said it would have been otherwise if the goods had been sent by the ship's boat, which is considered as part of the ship, and its passage part of the voyage. The jury (of merchants) thought it turned on that distinction, and found a verdict for the defendant accordingly.

Observations on this case.

But it would seem, that if it were the usage of a particular trade, that all the goods in that trade should be landed by the owners of such goods in their own lighters, the risk would continue even in those lighters, otherwise the words of the policy "*until safely landed,*" would, as far as related to that particular trade, be nugatory. And the principles laid down by the same learned judge, in the

the case of *Tiernay* v. *Etherington* (*a*), seem to warrant this distinction.—The two following cases will shew, that the risk continues on goods on board a common public lighter, though hired and employed by the owner of the goods for the purpose of landing them; this being done in the ordinary course of trade.

Rucker v. *Lond. Assur.* coram *Buller* J. at N.P. *June* 8, 1784.

Goods put into a *public lighter* for the purpose of being landed, are protected: But if the merchant send *his own lighter*, the insurer is discharged.

An insurance was made on the ship *Sophia*, and on goods on board, 'At and from *Grenada* to *London*;—on the 'ship till moored 24 hours, and on the goods, till dis-'charged and safely landed.'—In an action on this policy, the declaration stated, that before the goods, which consisted of sugars, were discharged and landed, they, by the perils of the river *Thames*, and the waters thereof, were washed away and lost.—On the trial it appeared, that the owners of the goods, for the purpose of landing them, had employed one of the public lightermen, who work on the river for hire, and whose lighters are numbered and entered at *Waterman's Hall*, without which no lighter is allowed to work on the river. On board of this lighter were put 57 hogsheads of sugar; and there were two men on board, (the usual complement for a lighter), beside the second mate of the ship. The lighter, as it was proceeding to the shore, struck upon the anchor of a ship, and sunk through unavoidable accident, and without any imputation of negligence in any person on board. The sugars being much damaged, the plaintiff went for the partial loss.—On the part of the defendant, it was contended, that though, by the policy, the risk was to continue till the goods were safely landed, and this was understood to mean, by the ship's boats, yet the custom of trade had, in some instances, substituted lighters. But here the merchants had taken upon themselves to employ the lighter, and this not being in the course of trade, the underwriters were discharged from the subsequent loss; for a merchant may, for his own convenience, depart from the usual course of trade.—Mr. Justice *Buller*, in his address to the jury, said;—"The decision of this cause depends on the usage;

(*a*) Sup. 250.

but

but the fact of usage being once established, the question, whether the underwriter is liable or not, is matter of law. But it belongs to the jury to say, whether that which has been done here, be or be not within the usual course of trade. The distinction is between *public* lighters and those which are the property of the merchant, and work only for him. Public lighters have a *stamp of authority*. They are entered at *Waterman's Hall*. The case of *Sparrow* v. *Carruthers*, does not affect this case. If a merchant will not send public lighters, it shall be a delivery to him when the goods are put on board his own lighter. But lightermen, appointed by the waterman's company, are *public officers*, and have a public credit."—The jury adopted this opinion, and found for the plaintiff.

Hurry and others, v. *Roy. Ex. Assur.* 2 *Bos.* & *Pul.* 430. 3 *Esp.* Rep. 289.

The consignee of goods in the port of *London* employs a common lighterman to land them. In the passage to the shore the lighter is sunk by accident: This is a loss within the policy.

So, where a ship and goods were insured from *Petersburgh* to *London*, in an action upon the policy, it appeared that the ship and cargo, consisting of hemp, arrived safe in the *Thames*; that the plaintiffs being the consignees of the goods, employed a lighterman belonging to one of the public lighters entered at *Waterman's Hall*, to land the hemp; that the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the *Russia* trade to land their goods by means of lighters, and that there are no lighters now in use among the merchants, but the public lighters.—Upon these facts, it was contended on the part of the defendants, that the rule laid down in the above case of *Sparrow* v. *Carruthers* (*a*), must apply to this case, the possession of the goods being altered, by the owner taking them into his own custody; and that it made no difference whether the lighter was public or private, because the person who hired it, made it his own *pro hâc vice*, and that the goods while on board it, were completely in his own custody.—But the court (*b*) determined that the defendants were answerable for the loss which happened in the lighter.—Mr. Justice *Heath* said,—

(*a*) Sup. 252.—(*b*) *Heath*, *Rooke*, and *Chambre*, Justices, lord *Eldon*, C. J. being absent.

"The

"The queſtion in this caſe is, whether the goods inſured have been *ſafely landed*, within the meaning of the policy. To every part of the policy we muſt give effect. It is admitted, that the unloading of *Ruſſian* ſhips is entirely carried on by public lighters, and that no private lighters are ever employed in that buſineſs. Then, what effect is to be given to the words, "*until the goods are ſafely landed*," if they do not extend to the goods when on board the public lighter; for in no other manner can they be ſafely landed. It is true, that the maſter and owners of the ſhip were diſcharged, when the goods were put into the lighter; but the freight and inſurance are not commenſurate; the latter is far more extenſive than the former. As to the caſe of *Sparrow* v. *Carruthers*, I think it ought not to be extended. It was only a *niſi prius* deciſion, which, though often cited, has never been recogniſed. I do not mean, however, to quarrel with that deciſion.—Mr. Juſtice *Rooke* ſaid,—"I cannot agree, that this caſe depends on the queſtion, who employs the lighter. Whether it be employed by the owner of the goods, or the owner of the ſhip, the danger is the ſame, and the riſk of the inſurer ought alſo to be the ſame."—Mr. Juſtice *Chambre* ſaid,—"The argument for the defendants reſts entirely on the caſe of *Sparrow* v. *Carruthers*. I do not wiſh to ſhake the authority of that caſe; nor, indeed, is it neceſſary to do ſo: But I cannot help obſerving, that if the deciſion had been different, I ſhould have been better ſatisfied with it. The only ground upon which it can be ſupported, is, that the owner of the goods completely accepted them, and diſcharged the owner of the ſhip from any further concern in them (*a*). But the caſe before Mr. Juſtice *Buller* (*b*) has

(*a*) If that be a ſufficient ground to ſupport the caſe of *Sparrow* v. *Carruthers*, might not the like deciſion be ſupported on the ſame ground in the preſent caſe; for, from the time the goods were put into the plaintiff's lighter, the owners of the ſhip loſt all control over them, and were therefore diſcharged from all further concern in them. But, as Mr. Juſtice *Heath* very

has more weight with me. In the present case I rely on the words of the policy, and the known and setled usage of the trade."

Matthie and others v. *Potts*, 3 *Bos.* & *Pul.* 23.

Goods put into launches for the purpose of being run on shore, in a contraband trade with the *Spanish* main, are protected while in the launches.

So, in a case where a cargo of *British* goods was insured from *Nassau* to *Campeachy*, and it appeared that, upon the ship's arrival off that port, she made signals, as is usual in that contraband trade, for launches to come out, into which the goods were put for the purpose of being run on shore on the *Spanish* main: But, in the attempt, they were seized by *Spanish* government vessels.—One question in this case was, whether the goods were protected by the policy, while on board the launches. The court seemed to be of opinion that they were.

If, while the goods are in a public lighter, the insured take charge of them himself, he discharges the underwriters.

But if the insurer, instead of leaving the goods under the care of the lighterman, take them under his own care and management, and discharge the lighterman from his responsibility, this will determine the risk and discharge the underwriters.

Strong v. *Natally*, 1 New Rep. 16.

As where goods in the usual way were put on board a lighter in the river *Thames*, and brought to the insured's wharf in the afternoon, but in consequence of the roughness of the weather, they could not be landed that evening; and the lighterman asked the insured whether he should stay and see the goods landed. The insured answered that he need not stay; for that he would look to the landing of them himself. The lighterman accordingly left the lighter alongside the wharf, which in the course of the night was sunk, and the goods lost.—The court determined that the insured having dispensed with the lighterman's keeping charge of the goods during the night, as he was bound to do, had discharged the underwriters from all subsequent responsibility.

The policy affords protection in the port of delivery, only till the goods can be conveniently landed.

Though the risk on goods, according to the usual words of the policy, is to continue " until they are dis-

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very justly observes, ' the freight and insurance are not commensurate.' In truth, the insurer, in such case, continues liable after the owners of the ship are discharged.—— (*b*) *Rucker* v. *Lond. Assur.* Sup. 166.

charged

charged and safely landed at the port of delivery, this is not to be understood as an authority to prolong the risk after the ship's arrival at her port of delivery, for any indefinite length of time, at the pleasure of the insured. The fair construction of this clause is, that the goods shall remain under the protection of the policy for a *reasonable time*, till they can be conveniently landed, and no longer.

Parkinson v. *Collier*, at N. P. *Park* 314.

A ship is detained on the coast of *Africa* before she can land her goods in the regular course of trade: The risk continues, if there be no unnecessary delay.

As, where an insurance was made from *London* to *Port Endick*, on the coast of *Africa*, on the ship till moored at anchor 24 hours, and on goods "*till discharged and safely landed.*" The ship arrived on the coast on the 6th of *May*, and was captured by the *French* on the 4th of *June*. It appeared that the trade was carried on by barter on board the vessel, and the goods afterwards sent on shore in boats, and gums brought back; that, in this case, the discharge of the cargo was not begun, the gums not having been brought down to the coast, but no delay was used.—In an action on the policy, it was contended on the part of the defendant, that, by the custom of this trade, the risk on the goods, as well as on the ship, ended in 24 hours after her arrival on the coast, and that the risk on the cargo, while on the coast, was protected by the homeward policy, which, in this instance, was at 15 guineas *per cent.*—Lord *Kenyon*, who tried the cause, refused the evidence both of the homeward policy, and of the supposed usage, (which he had on a former occasion admitted against his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the risk *till the goods were landed.* He said that, if, in landing, any unnecessary delay had been used, that might amount to something in the nature of a deviation; but that did not appear to be the case in the present instance.

Yet, if the cargo be sold, without unloading, and the vendee contract for the freight of it to another port, the insurer is discharged.

Yet, where a factor, after a ship's arrival at her port of discharge, sells the cargo on board, without unloading, and the buyer of the goods contracts for the freight of them to some other port; but before the ship breaks ground, she meets with an accident and is lost:—Here the insurers are discharged; for the property being

 changed,

changed, and freight contracted for *de novo*, it is the same as if the goods had been landed (*a*).

But the general rule may be controled by the usage of a particular trade.

But the following determination will shew, that where, by the usage of a particular trade, it is customary to keep the goods on board the ship even beyond the time when they might be conveniently landed, on account of the ship's crew being necessarily employed in other business, the risk will continue till the time when, *in the course of that trade*, they are usually landed.

Noble v. *Kennoway*, *Doug.* 492.

A ship and goods are insured to the coast of *Labrador*. The goods are left a long time on board after the ship's arrival; but this being usual in the fishing trade at that place, the risk on the goods continues.

An insurance was made on two ships, and on goods on board, 'From *Dartmouth* to *Waterford*, and from thence 'to the port or ports of discharge, on the coast of *Labrador*; on the *ships*, till moored at anchor 24 hours, and 'on the *goods*, *until the same should be there discharged and safely landed*.'—The two ships arrived on the coast of *Labrador*; the one on the 22d of *June*, the other on the 14th of *July* 1778; and from the time of their arrival, the crews were employed in fishing, and had taken out none of their cargoes, except at leisure hours, such things as were immediately wanted. On the 13th of *August* an *American* privateer entered the harbour, and took both vessels.—In an action on the policy, to recover the value of the goods, the defence was, that there had been an unnecessary delay in unloading the cargoes, and that the loss was therefore imputable to the negligence of the insured. On the other hand, the plaintiffs relied on the words of the policy, and the usage of the trade, which they proved to have been for three years, to proceed in voyages of this sort as the ships insured had done. It appeared that the plaintiffs had the only warehouses on the coast of *Labrador*, but that they were not sufficient to hold the goods, if they had been landed; that, in chartering ships for this trade, it was usual to stipulate that they should have 60 days allowed for discharging; and that in fact they were sometimes longer. That in the *Newfoundland* trade it was usual to keep their goods several months on board, and sometimes even till they have part of their homeward cargo of fish on board; that the first object is to catch fish, and they unload only

(*a*) General treat. of trade, 78. See *Leigh* v. *Mather*, inf 266.

when

when they cannot fish; and that the old cargo being chiefly salt and provisions, is gradually taken out as it is consumed.—Upon this evidence the plaintiffs had a verdict.—The defendant moved for a new trial, on the ground, that the policy on the *ships*, having expressed 24 hours after their safe arrival as the duration of the risk on them, no underwriter could suppose that he was to be liable for the *goods* for 50 or 60 days longer; that the fair construction of the policy was, that the goods were to be protected a reasonable time, and until they could be conveniently landed; that evidence of the usage of this particular trade ought not to have been admitted; and that a special clause might have been inserted in the policy for protecting the ship and goods during her stay.—But the court held, that the insurer was liable for this loss.—Lord *Mansfield* said;—"The trade of fishing on the banks of *Newfoundland*, especially for the west of *England*, has been known and practised for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The insurance here is on the ships, and *the goods till landed*. The defendant says, the plaintiffs have been guilty of unreasonable delay in landing them. That question was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. Every underwriter is presumed to be acquainted with the practice of the trade he insures, whether recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year. This trade has existed, and has been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage; and the same sort of fishing is carried on in the same sort of way at *Newfoundland*. The point is not analogous to a common law *custom*; and the evidence of a usage of a similar trade at *Newfoundland* was admissible."

Every underwriter is presumed to know the practice of the trade he insures in, though recently established.

The usage of another similar trade may be given in evidence, to shew the practice of a newly established trade.

When an insurance is upon goods generally, and the ship touches at a port in the course of the voyage insured, and there lands part of the goods insured, and takes others on board either in exchange for them, or purchased with the proceeds of them, all the *French*

When the risk continues on goods exchanged in the course of the voyage.

writers agree that the goods so newly taken on board are substituted in the policy for those that were landed, become part of the subject matter of the insurance, and the risk continues on them in like manner as on the goods originally put on board (*a*). But where goods are insured from the loading thereof at the ship's port of departure, the policy, though worded in the most comprehensive terms, will not protect goods shipped at any other place.

Grant v. *Paxton*, at N. P. 14th *July* 1807.

Goods are insured from *Canton* to all places in the *East Indies*, and until their safe arrival at *London*. The ship in distress puts into *Bombay*, sends her cargo in other ships to *Europe*, and, when repaired, takes a new cargo on board and sails for *China*.—The risk does not continue on the new cargo.

As where goods were insured on board the *Brunswick*, of which the plaintiff was captain, 'from *Canton* to all or 'any ports and places in the *East Indies*, in all places, at 'all times, in all services, &c. beginning the adventure 'on the said goods from the loading thereof at *Canton*, 'including the risk in craft from the shore to the ship, 'and to continue till the ship's safe arrival at *London*.'—The ship having sprung a leak in the voyage was forced to put into *Bombay*, where the cargo was put on board other ships and sent to *England*; and the ship being repaired at *Bombay*, the governor and council permitted the plaintiff to take a *new cargo* on board and return to *China*. In her passage thither she was captured.—It was contended on the part of the plaintiff that the policy would apply to any goods on board the *Brunswick* from any one place to any other in the *East Indies* or *China*: But Sir *James Mansfield* C. J. nonsuited the plaintiff, upon the ground that the policy did not apply to the new cargo shipped at *Bombay*; for the wording of the policy could only relate to goods *shipped at China*, and the policy contained no authority to change the cargo (*b*).

2. *Upon the Ship.*

When the risk on the ship begins and ends.

UPON the ship, the risk in some countries is made to commence from the time she begins to take in her first goods or ballast, and to continue till after she arrives at her place of destination, and is entirely discharged. In others, the risk is made to end twenty-one days after the ship's arrival, or sooner if she be unloaded (*c*).—In

(*a*) *Valin* art. 27. h. t. p. 78.; *Pothier* h. t. n. 63.; *Emerig*. t. 2. p 38.; vid. inf. ch. 8. f. 3. n. 3.——(*b*) Vid. inf. 270.——(*c*) 1 *Mag*. 47.

In *France.*

France, if the time of the risk on the ship be not regulated by the contract, it runs from the time she sets sail, till her arrival at her port of destination, and till she be there anchored and moored at the quay (*a*).

In *England.*

In *England*, the commencement of the risk on the ship varies in almost every case. In outward voyages, it is generally made to commence from her beginning to load at her port of departure.

Sometimes privateers on a cruise, ships engaged in the coasting trade or in short voyages, are insured for a limited period of time, which now, by stat. 35 *G.* III. c. 63. s. 12. (*b*) shall not exceed twelve calendar months; and, in such cases, the risk commences and ends with the term, wherever the ship may then happen to be.

If an insurance be *from* a place, the risk does not commence till her departure from thence.

If a ship be insured *from* the port of *London* to any other port, and before she breaks ground, an accident happen to her, the insurers are not answerable; for the risk does not commence till she sets sail on her departure from the port of *London*: But if the insurance be "*at* and from" the port of *London*, the insurers are liable for any accident that may happen to her, *from the time of subscribing the policy*.

If the risk on the ship be to commence in the same manner as that on goods, and the policy on the goods never attach, the risk on the ship will never attach.

If an insurance be made on a ship and goods on board, beginning the adventure on the goods, from the loading thereof at *A.*, and on the ships, '*in the same manner.*' If the goods be not loaded at *A.* the policy will never attach on them; and not attaching on the goods, it will not attach on the ship (*c*).

In homeward voyages, where the policy is "*at and from.*"

When a ship, which is expected to arrive at a certain place abroad, is insured "*at and from*" that place, or "*from her arrival*" there, the risk begins from the first moment of *her arrival at the place* specified; and the words "*first arrival*" are implied, and always understood in policies so worded. The risk in such cases continues there as long as the ship is preparing for the

(*a*) Ord. of *Louis* XIV. tit. *Contrats à la grosse*, art. 5. Vid. *Valin* on this art. *Pothier*, h. t. n. 63. *Emerig.* tom. 2. p. 14. ——(*b*) Inf. ch. 8. s. 3.——(*c*) R. *Robertson* v. *French*, 4 *East* 130, inf.

voyage insured (a): But if all thoughts of the voyage be afterwards laid aside, and the ship be suffered to lie there for a length of time, with the owner's privity, the insurer is not liable; for this would be to subject him to the whim and caprice of the owner, who might chuse to let the ship lie and rot there (b).

Objections to the time allowed by *English* policies.

In some foreign countries, the risk on the ship is made to continue, as we have already observed, till she is entirely discharged. In others, it continues for twenty-one days after her arrival, unless she be sooner unloaded.—But in *English* policies it is usually made to continue only '*until the ship hath moored at anchor* 24 *hours in good safety*,' —*Magens* objects, and not without reason, that freight is not earned till the cargo is completely discharged, and as it is almost impossible for a ship to unload in so short a time as 24 hours, the consequence is, that the freight remains unprotected, from the expiration of the 24 hours till the ship is discharged. Therefore, says he, in bottomry bonds, and policies of insurance, on ship and freight, there should be a stipulation that the risk shall not end till the expiration of a certain number of days after the ship's arrival (c).

The insurer is liable for no loss after the time.

Where the policy contains the usual words '*until she* '*hath moored at anchar* 24 *hours in good safety*,' the following case will shew that the insurer is answerable for no loss after the expiration of that time.

Angerstein v. *Bell*, at N. P. *Park* 35.

A ship is moored on the outside of a tier, there being no room for her within; and after the 24 hours she is driven from her anchors:—The insurer is not liable.

A ship arrived in the *Thames* at the wharf where she was to unload, on the 12th of *January*, and was laid on the outside of the tier, there being no room for her on the inside: Her sails were unbent, her top-masts struck, three anchors out, and she was lashed to another ship, and so continued till the 19th, when several ships and a quantity of ice drove athwart her stern, forced her adrift, and she was totally lost.—In an action against an insurer on this ship, lord *Kenyon* was of opinion that she

(a) Vid. sup. 155, 165.——(b) Per lord *Hardwicke*, in *Motteux* v. *Lond. Assur.* 1 *Atk.* 545. and in *Chitty* v. *Selwyn*, 2 *Atk.* 359. Vid. *Bird* v. *Appleton*, 8 T. R. 562. sup. 74.———(c) Vid. 1 *Mag.* 23. 47. Vid. *Skin.* 243.

was

was completely moored on the 12th of *January*; and as the accident did not happen till above 24 hours after that time, the insurer was not liable for the loss.

The following case shews that this rule holds, even where the loss arises from a cause which existed antecedent to the time of the ship's being moored.

This holds though the cause existed before the ship's arival.

A ship was insured from *Hamburgh* to *London*, and in the course of the voyage the master committed barratry by smuggling on his own account on the *English* coast; and for this smuggling, the ship, above three weeks after she had arrived in safety at her moorings in the *Thames*, was seized by the revenue officers.—In this case it was determined that though, by the stat. 24 *G.* III. c. 47. and the other excise laws, the forfeiture attaches the moment the offence is committed, and the ship may be seized at any time afterwards; and though the barratry, in this case, was committed *during* the voyage, yet the underwriters were not liable for this loss.—Mr. Justice *Willes*, in delivering the opinion of the court, said,—"Though the custom-house officers might seize for the forfeiture within three years after the fact, and the Attorney General might file an information at any time while the ship was in being, is the insurer during all this time to continue liable? Supposing the ship had gone several voyages afterwards; and suppose a partial loss paid, and the underwriter's name struck out of the policy, shall an action be afterwards brought upon the policy? His accounts could never be settled, nor could he be finally discharged while the ship was in existence. Such a position would be monstrous, and attended with infinite inconvenience. There must be some certain reasonable limitation in point of time laid down by the court, when the insurer shall be released from his responsibility. If he be liable for a month, he may be liable for a year, and so on. And we all think that the law on insurances would be left unsettled, and in much confusion, if any other time were suggested than that prescribed by the policy, namely, *the continuance of the voyage, and the ship's mooring 24 hours in safety.*"

Lockyer v. *Offley*, 1 T. R. 252. inf. c. 13. s. 5.

The master of a ship having been guilty of smuggling during the voyage, the ship is seized after she has been moored 24 hours.—The insurer is not liable, though the forfeiture attached the moment the offence was committed.

Meretony v. *Dunlop*, E. 23 *G.* III. in. B. R. cited by Mr. Justice *Willes* in *Lockyer* v. *Offley*, 1 T. R. 260.

A ship insured for a term, gets her death's wound during the time, but survives the term:—The insurer is not liable.

So, where an insurance was made on a ship for *six months*; and three days before the expiration of that time, she received her death's wound; but, by pumping, she was kept afloat till three days after the time; it was determined that the risk was at an end before the loss happened; and that therefore the insurers were not liable. Upon the same principle, if an insurance be made on a man's life *for a year*, and some short time before the expiration of the term, he receive a mortal wound, of which he dies, *after the year*; the insurer is not liable.

But if the ship from necessity be sent from her moorings before the 24 hours are ended, the risk continues.

But before the risk on the ship can be said to be completely ended, she must not only have been 24 hours moored at anchor in her port of destination, but she must have been during that time *in good safety*, in the fullest sense of those words. If, therefore, the ship be obliged to perform quarantine, this does not end the voyage. The voyage only ends when the ship is arrived at her port of destination, and is there moored 24 hours in good safety (*a*). And the following case will shew, that, if the ship, before the 24 hours are expired, be ordered to the proper place to perform quarantine, the risk continues, though she do not leave her moorings till long after the 24 hours are expired.

Waples v. *Eames*, 2 Str. 1248.

A ship, after being moored, but within the 24 hours, is ordered to the proper place to perform quarantine:—The risk continues.

A ship was insured, 'At and from *Leghorn* to the 'port of *London*, and till there moored 24 hours in good 'safety.'—She arrived on the 8th of *July* at *Fresh Wharf*, and moored, but was the same day served with an order to go back to the *Hope*, to perform a fourteen days quarantine. The men upon this deserted her, and the captain on the 12th applied to be excused going back, which petition was adjourned to the 28th, when he was ordered back. On the 30th, she went back, performed quarantine, and then sent up for orders to air the goods, which he could not do till the 14 days were expired; but before the ship returned, she was burnt on the 23d of *August*. —It was ruled (*b*) that though the ship was so long at her moorings, yet she could not be said to be there in

(*a*) Vid. *Cleirac*, ch. 9, art. 15.—(*b*) At N. P. probably by *Lee*, C. J.

good

good safety, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the 24 hours, and the hands having deserted, and government having taken time to consider the petition, there was no default in the master or owners.

Upon the same principle, if the ship, on her arrival at her port of destination, be subject to seizure under an embargo and a declaration of reprisals, and she be in fact seized within the 24 hours, though she be permitted afterwards to land her cargo, the insurer is liable.

So, if the ship be seized at her port of delivery as prize, within the 24 hours.

Thus: A ship was insured 'from *Bilboa* to *Rouen*, and 'till 24 hours moored in safety there.'—The ship arrived, but an embargo had been laid on all *English* vessels in that port. The captain went on shore the day he arrived, and the next day the embargo was laid on his ship. He was afterwards permitted to land his cargo, which he delivered to his consignees, but the ship was detained as prize, and the captain and crew allowed subsistence, as prisoners of war, from the time of their arrival.—In an action on the policy, it was ruled by Lord *Kenyon*, that the ship was as much within the power of the enemy, as if a guard had been put on board the moment she arrived. She could not, therefore, be said to be 24 hours, or a minute, moored in *safety*, as far as relates to the insured; for immediately on entering the port she was, to all intents and purposes, captured by the *French*.

Minnett v. *Anderson*, at N. P. *Peake* 211.

A ship arrives at her port of destination, and finds an embargo laid there, upon which she is detained as prize:—The insurers are liable, though she was permitted to land her cargo and deliver it to the consignees.

When the voyage insured is described in general terms, as '*from* A. *to* B.,' without expressing how long after her arrival the insurance is to continue; it has been holden that the risk upon the ship continues till she has been unloaded and discharged from the voyage (*a*.)—And though it seems reasonable that an insurance on the ship, for the voyage from *A.* to *B.* generally, should continue till the object of the voyage is accomplished, that is, till her cargo is landed; yet it has been determined that an insurance upon a ship, to *Jamaica generally* ends as soon as she moors 24 hours in any port in the island, and does not continue till she comes to her last port of delivery.

If the risk be from *A.* to *B.* generally, it has been holden that it lasts till the ship is unloaded and discharged.

Yet an insurance to *Jamaica* generally ends, as soon as the ship has anchored 24 hours at any port there.

(*a*) R. Anon. *Skin.* 243.

Thus:

Camden v. Cowley, 1 Bl. 417 and 418.

Thus: A ship was insured 'From London to Jamaica' generally; and, by a subsequent policy, she was also insured, 'at and from Jamaica to London.'—The ship, having touched and staid for some days at one port of Jamaica, was lost in coasting the island, but before she had delivered all her outward cargo at the other ports of the island.—The ship was what is called a general ship; that is, she was advertised at Lloyd's coffee house as bound to the island generally; and, by the course of trade, to touch at the several ports of the island there to deliver some goods and take in others.—In an action on the homeward policy, in order to shew where the homeward risk commenced, it was necessary to shew at what time the outward risk determined; and after an examination of merchants as to the custom, it was decided by a special jury that the underwriters on the homeward policy were liable for the loss, being of opinion that the outward risk ended when the ship had moored twenty-four hours in any port of the island; and did not continue till she came to the last port of delivery.—Upon a motion for a new trial, Lord Mansfield said that the inclination of his opinion was the contrary way. But as the cause had been thoroughly tried, and no new light could be thrown on it, he was against granting a new trial. The other judges concurred, and Mr. Justice Wilmot said he was of opinion that the verdict was right, the ship having arrived at Jamaica, the first port she came to trade in.

Barrass v. Lond. Assur. at G. H. after Hi. 1782. S. P.

In a similar case Lord Mansfield laid down the same doctrine to the jury, namely, that the outward risk upon the ship ended after her arrival in the first port of the island to which she was destined; but that the outward policy upon goods continued till they were landed.

Leigh v. Mather, at N. P. 1 Esp. Rep. 412. General insurance on ship and goods to Jamaica. The ship, after discharging part of her cargo at one

So, where an insurance was made on the ship Paliser and goods on board, 'At and from Georgia to Jamaica, 'and till moored 24 hours in safety.'—The ship arrived at Montego Bay, where she moored and remained nearly a month, and the agent of the insured sold, and delivered, the greatest part of her cargo to merchants there. The captain then chartered the ship to proceed from thence

to

to *St. Anne's*, and there take in a cargo for *London*; and it was verbally agreed that the remainder of the cargo, which was lumber, should be carried *as ballast* to *St. Anne's*. Accordingly the ship, after taking in some fustick, proceeded toward *St. Anne's*, but was lost in her passage thither.—In an action on the policy, it was urged for the plaintiff, that the policy being in general terms, '*to Jamaica*,' it meant to include all the ports in that island, at which any part of the cargo was to be delivered; and therefore, upon such an insurance, the *ship* may go from port to port; but at all events, the *goods* were protected by the policy *till they were all discharged and safely landed.*—But Lord *Kenyon*, who tried the cause, held clearly that the risk on the *ship* ceased on her being moored 24 hours in the first port of the island, *for the purpose of unloading*:—He said that, when a ship is insured to any particular port of delivery, if by stress of weather she be forced into a different port, and there discharge part of her cargo, she is nevertheless protected by the policy till she arrives at her port of delivery. But it appearing in evidence that *Montego Bay* was the original destination of the *cargo*, and that its not being wholly delivered there, was only prevented by the new agreement, he held that nothing could be recovered for the loss of *goods*; for a ship, insured to *Jamaica generally*, cannot be permitted to go from port to port, round the whole island, for the purpose of unloading, especially where, as in this case, the same person is owner of both ships and goods.

port, is chartered for another voyage, in which she is to deliver the rest at another port of the island.—The risk ended on both ship and goods, at the first port.

In *France* it was usual to insure to the *French West India* islands generally; and then the risk on *goods* continued till they were landed at their respective places of destination; and on the *ship*, till she had discharged her cargo at the last of those places.—But where the ship had discharged all but a small part of her cargo, amounting to about one *per cent.* on the whole, and had begun to take in her homeward cargo, the risk on the ship was considered as at an end, and the insurer discharged (*a*).

Manner of *French* insurances on *West India* voyages.

(*a*) *Emerig.* tom. 1, p. 72.

But

But they hold, that so long as any considerable part of the cargo remained on board, the risk continues, though part of the homeward cargo be put on board.

As where an insurance was made on a ship and cargo 'from *Bourdeaux* to the *French West India Islands*; with 'liberty to touch, stay, and trade at such ports or places as 'the captain should think proper (*a*).—The ship arrived at *Jaquemel* in *St. Domingo*, and there disposed of part of her cargo, and took on board 26 bales of cotton, and after a stay of five months, sailed for *St. Louis*, to continue the sale of her outward cargo, and to procure the remainder of her homeward cargo. On her passage thither she was chased by three *English* privateers into a bay, where the captain landed as much of the cargo as he could, and then set fire to the ship, to prevent her falling into the hands of the enemy.—In a suit to recover for this loss, the insurers contended that as the ship, before the loss happened, had begun to take her homeward cargo on board, this put an end to the outward voyage, and discharged them. On the part of the insured it was insisted that the 26 bales of cotton were too inconsiderable to change the character of the voyage from outward to homeward; that there was nothing in the contract to prevent the replacing a part of the cargo, by goods of the place where the ship touches, and that the risk on the ship continues till the outward cargo is all, or nearly all, landed.—The insurers were condemned to pay the loss. This sentence upon appeal was reversed; but, upon appeal to the parliament of *Bourdeaux*, the original sentence was affirmed, and the insured recovered (*b*).

It is observed by *Emerigon* on this case, that as the cargo was not all disposed of at *Jaquemel*, the ship's departure for *St. Louis* ought to be looked upon as a continuance of the voyage, and upon that principle the final decision was

(*a*) This, I conceive, is the meaning of the words, '*Touchant et faisant échelle aux endroits que bon semblera au capitaine*.' See *Emerigon's* explanation of this clause in *French* policies, vol. 2. p. 40.——(*b*) Vid. *Emerig*. tom. 2. p. 73.

right;

right: But that it would have been otherwiſe, if, by the ſale of all, or nearly all the cargo at *Jaquemel*, the outward voyage had been ended.

The riſk on the furniture of the ſhip may continue even when put on ſhore.

In general, the riſk on the rigging, tackle, furniture, and proviſions of the ſhip inſured, continues no longer than they are attached to, or, remain on board the ſhip. But where it is neceſſary to put theſe articles on ſhore during a repair, and this is the uſual practice in ſuch caſes, the riſk continues on them while on ſhore, and if they are loſt or damaged by any of the perils mentioned in the policy, the inſured is liable.

Pelly v. *Roy. Ex. Aſſur.* 1 *Bur.* 341.

The rigging and tackle of a ſhip are put on ſhore during a repair in the uſual courſe of the voyage, and are burnt by accident:—This is a loſs within the policy.

Thus: An inſurance was made on the ſhip *Onſlow*, 'At and from *London* to any ports or places beyond the 'Cape of *Good Hope*, and back to *London*, free from 'average under 10 *per cent.*, upon the body, tackle, &c. 'of the ſhip: Beginning the adventure from the date of 'the policy, and to continue till the ſhip ſhall have arrived 'as above, and there anchored 24 hours in good ſafety.' The ſhip arrived in the river *Canton*, in *China*, where ſhe was to ſtay to clean and refit, and for other purpoſes. Upon her arrival there, all her rigging and furniture were, by the Captain's orders, taken out of her, and put into a ſtorehouſe called a *Bank Saul*, built for that purpoſe on a ſand bank, in the river, near *Bank Saul Iſland*, in order to be there repaired, and preſerved till the ſhip ſhould be heeled, cleaned, and refitted. Soon after, a fire broke out in a *Bank Saul* belonging to a *Swediſh* ſhip, which communicated to that belonging to the *Onſlow*, and conſumed it, together with her rigging and furniture. It appeared to be the univerſal uſage for many years, for *European* ſhips, when they arrive near this *Bank Saul Iſland* to unrig and depoſit their rigging and furniture in a *Bank Saul* in the manner above deſcribed. And this is for the benefit of all perſons concerned in the ſafety of the ſhip. The ſhip having been again rigged, and put into the beſt condition the place would permit, arrived in the *Thames*.—Upon this caſe it was inſiſted on the part of the defendant, that though the inſurer was liable for all loſſes, *during the courſe of the voyage*, yet that this liability was confined to loſſes *at ſea* only; whereas this was a loſs on ſhore. But the court determined, after great con-

conſideration

sideration, that the loss on the *Bank Saul* was a loss within the words, intent, and meaning of the policy.—Lord *Mansfield*, in delivering the opinion of the court, said,—"The tackle, apparel, and furniture, of the ship, were insured expressly from fire during the voyage, and until her return to *London*. These being destroyed by fire, during the voyage, and before her return, is a loss within the general words of the policy; and it was therefore incumbent on the defendants to shew, from the manner in which it happened, that it arose from a peril against which they did not insure. But the insurer, in estimating the premium, must have considered the usual course of the voyage; and describing the voyage in the policy is an express reference to the usual manner of making it, as much as if every circumstance were mentioned. The only objection was, that the loss happened on *land*, and not in the ship, or on the water. To this the obvious answer is, that neither the words, nor the intent, of the policy make such a distinction."

If a loss be within the *general words* of the policy, the insurer must shew that it arose from a peril not insured against.

Describing the voyage in the policy is an express reference to all the circumstances attending it.

Such a loss is to be considered in the same light as if it had happened on board the ship.

So, in a similar case, where the ship's *provisions* were landed and put into a *Bank Saul*, and there destroyed by an accidental fire, the question was, whether those provisions were covered by the policy; but it was admitted that, if they were, it was to be considered in the same light as if the accident had happened *on board the ship* (*a*).

Every underwriter is bound by the usage of the trade on which he becomes an insurer.

Every underwriter may fairly be presumed to be fully conversant in the usual course of the trade on which he becomes an insurer; and he will be bound by the usage of such trade, as much as if it were particularly inserted in the policy. This rule has been already exemplified in the case of *Noble* v. *Kennaway* (*b*), and it is particularly to be attended to by underwriters upon *East India* voyages, the policies on which are so unlimited, as to time and place, that they include the country voyage there, and all risks that may be run in consequence of any new agreement made in *India* to prolong the time mentioned in the charter-party; nor is it necessary to inform the underwriters of such new agreement; as that, and all other

(*a*) *R. Brough* v. *Whitmore*, 4 T. R. 206.——(*b*) Sup. 258.

necessary

necessary information on the subject, may readily be had at the *India House* (a).

As where an insurance was made on a ship, 'At and 'from *Bengal*, to any ports or places in the *East Indies*, '*China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*, 'forwards and backwards, and during her stay at each 'place, until her arrival at *London*.'—In an action on this policy, it appeared that the charter-party was in the usual printed form, containing a clause impowering the company's servants in *India* to detain the ship for any time they pleased, not exceeding a year from the time to which she was chartered; that the ship sailed on the 25th of *March* 1762, arrived at *Bombay* the 19th of *September*; left *Bombay* the 4th of *November*; arrived at *Calcutta* the 5th of *March* 1763; that on the 28th the president and council entered into a new agreement with the captain, reciting that the charter-party would expire on the 11th of *February* 1764, but that it was expedient to detain the ship in *India*, and the captain agreed to let the ship for a year from that day; that in *July* 1763, the ship arrived a second time at *Bombay*, sailed for *Bengal* in *December*, arrived there early in 1764, sailed again for *Bombay* the 19th of *March*, and on the 21st was lost; that on the 3d of *April* 1764, the owner received a letter from the captain, dated the 14th of *April* 1763, with a copy of the new agreement, which was publicly read in a coffee-house; that the next day some insurances were made by the owner, and on the 17th of *July*, other insurances were made,—all after this letter was publicly read; that it was very common in this trade to detain ships for a year by a new agreement, which was very beneficial to the owners, to which usage the words of the policy are adapted, being without limitation of time or place, and without any reference to the first voyage; that all this might have been learned at the *India House*, but at the time of the underwriting, no mention was made, or question asked, when the ship sailed, or when she arrived, or whether she was continued for a year according to the proviso in the charter-party; and none of the underwriters

Salvador v. *Hopkins*, 3 *Bur.* 1707.

An insurance upon an *India* voyage, includes the risk of the country voyage by the usage of the trade.

(a) But *see Grant* v. *Paxton*, sup. 260.

desired

desired *to be off*, after they knew of the new agreement to prolong the ship's stay.—The defence was, that the policy was void, because at the time it was underwritten, the underwriters were not told of the new agreement to detain the ship beyond the time provided by the charter-party. —But the court determined that, under all the circumstances, the plaintiff was entitled to recover.—The reasons which governed the court in this decision were;—That the underwriters are presumed to know the course of the *East India* trade, the terms of the charter-party, and the destination of the *India* ships, (which are under the direction of the Company, and not of their owners); that the charter-party is a printed form of very long standing; that, besides the liberty thereby given, to prolong the ship's stay for a year, it is very common, by a new agreement, to detain her a year longer; for no ship comes home in ballast, and the longer a ship is kept, the more beneficial to the owners; that the words of the policy are adapted to this usage, being without limitation of time or place, and without any reference to the first voyage particularly mentioned in the charter-party; that the terms of the policy precisely describe the risk in its utmost latitude, and necessarily extend to every prolongation of stay, and every country voyage; that the usage of the *India* trade, and the course of the voyages in it, were notorious to insurers, who must be supposed sufficiently conusant of them, and the obligation of the policy is taken from the usage, and the words of the charter-party, which refer to that usage, in the same manner as if it were expresly inserted in the policy; whereas if every person insured should be obliged to state to the insurer all the grounds of his expectations, as to the ship's continuance in *India*, or her returning to *England*, it might produce great litigation and confusion in cases arising upon these policies; besides, it would be contradictory to the policy, to say that the underwriter did not insure for a country voyage.

Gregory v. *Christie*, B. R. Tr. 29 *G.* III. MS. sup. 94.

A similar question arose upon a policy on goods, specie, and effects, on board an *East-Indiaman*, on her voyage 'From *London* to *Madras* and *China*; with liberty to 'touch, stay, and trade at any ports or places whatsoever.' —When

If in a policy on an *India* voyage, there be liberty

—When the ſhip arrived at *Madras*, ſhe was too late to go to *China* that year; upon which ſhe was employed by the council there to go from *Madras* to *Bengal*, to fetch rice; which voyage ſhe performed once, and proceeded on the ſame voyage a ſecond time, in which ſhe was loſt.—It was objected that theſe intermediate voyages were not inſured under the policy; for the words, "*to* "*touch, ſtay, and trade at any ports or places whatſoever,*" only meant to give a licence to ſtay at ſuch places as it ſhould be neceſſary to ſtop at *in the courſe of the voyage.*—The court, however, determined, that theſe intermediate voyages conſtituted a riſk within the policy; and that the inſured were therefore entitled to recover.—Lord *Mansfield* ſaid,—"To underſtand this policy you muſt refer to the courſe of the trade to which it relates. By the uſual courſe of the trade, if an *India* ſhip come to *Madras* too late in the ſeaſon to proceed to *China*, the council employs her in an intermediate voyage. It is for the benefit of all concerned that ſhe ſhould be ſo employed; the underwriters are perfectly well acquainted with this uſage, and are bound to take notice of it. Before the year 1780, it was uſual to inſure both the outward and homeward voyages in one policy, and then the words "*backwards and forwards*" were inſerted. Since then, they have divided it, and inſure each voyage in a diſtinct policy. The policy in queſtion differs from others, becauſe it contains not only the uſual permiſſion *to touch and ſtay* at any ports or places, but alſo to *trade* there; which are words ſo large that they ſeem ſufficient to include the intermediate voyage. It would narrow the conſtruction very much indeed, to ſay that the policy relates to thoſe places only, at which they ſhall ſtop in the voyage. The words employed certainly take in the intermediate voyage; and the uſage of trade confirms this conſtruction."

'*to touch, ſtay, and trade* at any ports or places':—This covers the riſk even of a *ſecond* country voyage.

Even where the liberty is only '*to touch and ſtay*,' intermediate voyages are ſometimes, by the uſage of the trade, covered by the inſurance.

As where a ſhip was inſured, 'At and from *London* to '*Madras* and *Bengal*, beginning the riſk upon the ſaid ſhip, 'at

Farquharſon v. Hunter, B. R. Hil. 25 G. III. MS S. C. *Park.* 50.

In a like policy, the liberty was only to *touch and stay* at any port, &c. in the voyage:—By the usage of the trade, this covered the risk on the intermediate voyages.

'at *London*, and so to continue till the arrival of the said 'ship at *Madras* and *Bengal*, with liberty *to touch and stay* '*at any port or place* in the voyage.'—The ship arrived at *Madras*, where, by an order of council, she was unloaded, and sent for rice to *Visagipatnam*, and her voyage to *Bengal* was postponed. She was afterwards sent to *Bengal* in ballast, and was taken in her passage.—In an action on the policy, Lord *Mansfield*, at the trial, thought that the words of the policy would not admit of such a latitude of construction, as to take in the intermediate voyage, the words being much narrower than those in the last case; and the plaintiff was nonsuited. But this nonsuit was afterwards set aside, the court being clearly of opinion that the risk continued during the intermediate voyages.—Lord *Mansfield* said,—"This being a policy on the ship on an *India* voyage, and the usage, as to the intermediate voyages, being notorious to all parties, the contract must be considered as referring to it. This usage is, that, when the ships arrive at *Madras*, the council may send them elsewhere."

But the general words will not extend the risk beyond its description.

Yet the general words usually inserted in policies on *East India* voyages, such as, '*in all ports and places, at* '*all times, backwards and forwards, in all services,*' &c. do not extend the risk beyond what the particular description of the risk in each policy fairly warrants.

Grant v. *Paxton*, at G. H. 14th *July*, 1807.

Goods are insured from *Canton* to all places in the *East Indies*, and till the ship's arrival at *London*. The ship springs a leak and is obliged to put into *Bombay*, from whence the goods are sent in other ships to *London*. A new cargo is shipped for *China*, and in this voyage the ship is taken: The underwriters are not liable.

As where goods were insured on board the *Brunswick*, of which the plaintiff was captain, 'from *China* to all or 'any ports or places in the *East Indies*, in all places, at 'all times, and in all services; beginning the adventure 'on the said goods *from the loading thereof on board the* '*said ship at China*, including the risk in craft, and to 'continue until the ship and goods should be safely arrived at *London*.'—The ship having sprung a leak, was obliged to put into *Bombay*; from whence the plaintiff's own adventure and the goods of the company were sent to *Europe* in other ships, and the *Brunswick* being repaired, the plaintiff entered into a new agreement with the governor and council to suspend the charter-party till the ship should get back to *China*, which was to be revived on her arrival there, and a cargo brought from thence on the company's account. The plaintiff having

having taken a small investment on board on his own account, sailed for *Canton*, and was captured on his voyage thither.—Sir *James Mansfield* C. J. nonsuited the plaintiff upon the ground that the policy could only apply to the goods shipped at *China* for *London*, and not to those shipped at *Bombay* for *China*; and that there were no words in the policy to shew that a change of cargo was in contemplation.

A liberty to touch and stay at any ports or places, means only places in the usual course of the voyage.

But though, by the well known usage of any particular trade, a voyage is sometimes covered by the policy, which is not within the express words of it; yet, the general rule is, that a liberty '*to touch at any ports or* '*places*,' means only places in the usual course of the voyage; and this general rule must be considered as applicable to voyages undertaken by the ships of foreign nations, unless the usage of the particular trade in which they are engaged be made known to *British* underwriters, who cannot be presumed to be conusant of such usage.—This was so determined in the case of *Lavabre* v. *Wilson*, which we have already had occasion to cite at large (*a*).

A liberty to touch at a place must be strictly adhered to. If goods be shipped or landed, unless provided for in the policy, it will amount to a deviation.

Where a ship has liberty to touch at any place in the course of the voyage, she must confine herself strictly to the object for which this liberty is granted. Any attempt, for instance, to *trade* during her stay there, as by shipping or landing goods, will amount to a species of deviation, and put an end to the policy; unless the ship have liberty to trade, as well as to touch and stay (*b*). And the rule in this respect is so strict that a liberty to touch and discharge goods at a place, will not warrant the captain in taking in a new cargo there, even while the ship is waiting for convoy, or detained by contrary winds; for this would be a new adventure not within the policy (*c*).

The risk may be properly commenced, though under circumstances unforeseen at the time of the contract.

If the voyage described in the policy have really been commenced, though at a time, and under circumstances,

(*a*) Sup. 192.——(*b*) Per lord *Kenyon*, in *Stitt* v. *Wardell*, 1 *Esp.* Rep. 610. inf. ch. 12. s. 1.——(*c*) Per lord *Ellenborough*, in *Sheriff* v. *Potts*, 5 *Esp.* Rep. 96.

very different from those which were in the contemplation of the parties at the time when the policy was effected; yet, if there be no fraud, misrepresentation, or concealment on the part of the insured, this shall be a good commencement of the risk.

Driscol v. *Passmore*, 1 *Bos.* & *Pul.* 200.

A ship insured from *A.* to *B.* (being represented as a specific part of a voyage from *B.* to *C.*) from thence to *A.* and back to *B.*, having sailed to *C.* is obliged to return to *B.* from whence she sails to *A.* and is captured on her voyage back to *B.*—The insurer is liable, though the original voyage, of which the voyage insured was a part, was not performed; and the sailing from *A.* for *B.* was a good commencement of the voyage insured. See also *Driscol* v. *Bovil*, sup. 291.

Thus:—The ship *Timandra* having sailed from *Lisbon* on a voyage to *Madeira*, from thence to *Saffi* on the coast of *Africa*, and back from thence to *Lisbon*, the plaintiff having received intelligence of the ship's arrival at *Madeira*, and that she was about to proceed on her voyage to *Lisbon*, caused an insurance to be effected on freight from *Saffi* to *Lisbon*.—It appeared that when the ship arrived at *Madeira*, all the crew except two, being alarmed by reports of some *Moorish* cruisers being off *Saffi*, and their having captured and ill-treated a *Dane* and an *American*, quitted the ship, and refused to return to her, unless the captain would promise to sail immediately back for *Lisbon*. Under these circumstances the captain carried the ship back to *Lisbon*; but on his arrival there, the charterers insisted on his proceeding directly from thence to *Saffi*, which he accordingly did, and was captured on his return from *Saffi* to *Lisbon*.—It was contended on the part of the defendant, 1st, That where a voyage is insured from *A.* to *B.*, it must appear either that the ship is at *A.* at the time of the insurance, or how and when she is to arrive there; otherwise it would be an indefinite insurance on the first voyage which the ship should make from *A.* to *B.* with the same master, and the other requisites of the policy; that if it be stated whether the ship be at *A.* or when she will be there, this becomes an ingredient in the risk insured; and consequently, as the ship, instead of proceeding to *Saffi*, had returned to *Lisbon*, the voyage insured was abandoned; or rather, as the previous part was abandoned, the voyage insured never commenced. 2dly, That this was not an insurance on any voyage which the ship might make from *Saffi* to *Lisbon*; but on a voyage from *Saffi* to *Lisbon*, being *part of a voyage*, already commenced, from *Lisbon* to *Madeira*, from thence to *Saffi* and from *Saffi* back to *Lisbon*; and that the representation of this to the under-

writers

writers was the same in this case as a warranty, in as much as there was a substantial deviation from it; that the voyage undertaken at the instance of the charterer was a new voyage; and that no recommencement of what had once been abandoned, could make the underwriter liable.—The court determined, however, that the plaintiff was entitled to recover.—Lord C. J. *Eyre* said,—"It is admitted, that this is a new case, and there are no authorities on the subject. It has been argued on the part of the defendant, that the voyage insured was the third branch of a voyage specifically described in the policy; but I take the voyage insured to have been a voyage from *Saffi* to *Lisbon* only. Now, that the voyage described did literally commence, there can be no doubt, and I know of no way in which that voyage could be restricted in point of commencement or connexion with any other voyage, but by representation or warranty. If a man be asked to underwrite a voyage from *Saffi* to *Lisbon*, he naturally enquires what this voyage is, and at what time it will commence, that he may judge of the risk. He will expect a representation, and that representation ought to be true. Here the representation was, that the ship was bound from *Lisbon* to *Madeira*, from thence to *Saffi*, and from *Saffi* to *Lisbon*. That representation was true at the time it was made, and the underwriter was to form his own calculation of the time when the ship would arrive at *Saffi*. If the insurance be made on a representation which is true at the time, it would be difficult to state a case where subsequent events, not happening through misconduct, and not totally disappointing the voyage, would discharge the underwriter. In this case the underwriter formed his judgment of the risk, knowing that all was executory, and that an alteration might arise that might increase the risk. He underwrote upon the representation made to him. A circumstance occurred under which the captain was at a loss how to act. He resolved to go back to *Lisbon*, and there the charterer required him to fulfil his engagement. He sailed accordingly, and arrived at *Saffi*; and in the course of his voyage home was captured. Then, why are not the underwriters lia-

 ble?

ble? They were literally bound to insure a voyage from *Saffi* to *Lisbon*; tied up, indeed, as far as a representation of the projected voyage, executory in its nature, and true at the time, could tie it up.—The voyage from *Saffi* to *Lisbon* might have been performed with as much ease after the circuitous voyage had taken place, unless a *Spanish* war had broken out, as in the direct course originally performed, from which the ship was diverted, by circumstances for which no one was to blame."

3. *Upon Freight.*

Upon *freight*, the risk does not commence till the goods are on board.

In an insurance on *freight*, the risk generally begins from the time the goods are put on board. If, before any goods are put on board, an accident happen to the ship which prevents her sailing, the insured cannot recover for the loss of freight which the ship *might* have earned if the accident had not happened.

Tonge v. *Watts*, at N. P. 2 *Str.* 1251.

Thus:—An insurance was made 'on ship and 'freight, at and from *Jamaica* to *Bristol*.'—A cargo was ready to be put on board; but while the ship was careening for the voyage, a sudden tempest arose, and she was lost.—In an action on the policy, the defendant paid the loss *upon the ship* into court. But the plaintiff insisted on the loss of the *freight* the ship *would have earned*, if the accident had not happened.—But lord C. J. *Lee* ruled, that as the goods were not actually on board, so as to make the plaintiffs right of freight *commence*, he could not be allowed it.

If part be shipped, the insured upon a valued policy may recover.

But if part of the cargo had been put on board, and the rest be ready to be shipped, the insured may recover for the whole freight upon a valued policy.

Montgomery v. *Eggington*, 3 T. R. 362.

As where an insurance was made on freight, valued at 1500*l*., and the ship was driven from her moorings and lost, when goods only to the amount of 500*l*. freight were on board, though goods to the amount of the rest of the freight were, at the time, lying on the quay, ready to be shipped.—In an action on this policy, lord *Kenyon* left it to the jury to consider, whether this was a mere colourable insurance, and a gaming policy, or a

bona

bonâ fide transaction: If the latter, he was of opinion, that the insured was entitled to recover for the whole value in the policy. The jury found the whole sum.— The defendant's counsel obtained a rule for a new trial, which he afterwards abandoned, the court being strongly of opinion against him.

But though the commencement of the risk on freight is, in general, from the taking of the goods on board; yet the following case will shew, that where the ship is to sail to a distant place to take in her cargo, the risk commences on the freight from the time of her sailing for that place.

If the ship be lost on her way to her port of loading the insurer is liable for the whole freight.

A ship was chartered, 'To depart from the *Thames* 'and proceed to *Teneriffe*, and there to receive on board 'from the freighters, 500 pipes of wine, to be delivered 'in the *West Indies*.'—A valued policy was effected on half the freight, 'At and from *London* to *Teneriffe*, and 'from thence to any of the *West India* islands, *Jamaica* 'excepted; and at and from thence to the *Bay of Honduras*.'—The ship was taken on her voyage to *Teneriffe*. —It was determined, that, as the charter-party was an entire contract, and as the ship's departure from the *Thames* was an inception of that contract, an inchoate right to freight commenced upon her departure, which was an insurable interest. And as the loss of the ship necessarily induced the loss of the freight, the insured had a right to recover for that loss upon this policy, which was an insurance on the freight. That this case was distinguishable from that of *Tonge* v. *Watts* (*a*), where the inception of the risk would have been the taking of the goods on board; and that it was as great an interest as the profits expected to arise from a cargo of molasses, which, in the case of *Grant* v. *Parkinson* (*b*), was held to be an insurable interest.

Thompson v. *Taylor*, 6 T. R. 478.

A ship sails from *London* to *Teneriffe*, to take in a cargo for the *West Indies*, and is lost in that voyage:—The insurers on freight are liable.

So where a ship was chartered from *London* to *Dominica* and back to *London*, at a certain stipulated freight for the *outward* cargo; and, after the delivery thereof at *Dominica*, the charterers were to provide her a full

Hornecastle and others v. *Stuart*, 7 *East* 400.

A ship is chartered from *A*. to *B*. and back to *A* at a certain freight for the outward voyage, and the current freight home.

(*a*) 2 *Str*. 1251. sup. 278.—(*b*) Sup. 97.

Before she unloads her whole outward cargo, and before any of her homeward cargo is shipped, she is lost:—This is a loss on a policy on the homeward freight.

cargo, at the current freight, for *London*.—An insurance was effected on the freight of this ship, 'at and from 'Dominica to London.'—The ship arrived at *Dominica*, and unloaded a great part of her outward cargo; but, before she had taken in any part of her homeward cargo, she was captured.—It was objected on the part of the underwriters, that, as no part of the homeward cargo was put on board before the capture, the risk had not commenced.—But lord *Ellenborough*, who tried the cause, over-ruled this objection, being of opinion that the voyage in which the freight was to have been earned having commenced upon the ship's departure from *London*, according to the terms of the charter-party, which made it one entire contract, this case was governed by the foregoing case of *Thompson* v. *Taylor*; whereupon the plaintiff obtained a verdict.—Upon a motion for a new trial, the court concurred in the opinion given by lord *Ellenborough*.

Observations on the above case.

It may not be improper here to observe that had the plaintiff's case rested solely on the policy, without any aid from the charter-party, it could not have been distinguished from that of *Tonge* v. *Watts* (*a*); for, as the voyage insured was to commence at *Dominica*, and as no part of the homeward cargo was put on board before the capture, there could have been no inception of the risk. Now, as to the charter-party, that could only be considered as *res inter alios acta*, of which the underwriters do not appear to have had any notice at the time the policy was effected. But even supposing they had had full notice of its contents, may it not, with all deference, be doubted whether, as between the insured and the underwriters, the voyage from *Dominica* to *London* ought not to have been deemed a distinct voyage, and wholly unconnected with the outward voyage (*b*).

If an insurance on freight be from several places of departure, the risk will not commence till the ship sails for her port of destination.

If there be several ports of departure mentioned in the policy, and the insurance be at and from any one of them to the port of destination, the risk on freight will

(*a*) Sup. 278.——(*b*) Vid. *Sellar* v. *M'Vicar*, 1 New Rep. 23. inf. ch. 8. s. 3.

not commence upon the ship's departure from any one of those to another of them, before her final departure to her port of destination.—As if freight be insured from *A. B.* and *C.* to *D.*, and the ship be engaged to carry a cargo from *A.* to *B.*, and another from *B.* to *D.*; a departure on the voyoge from *A.* to *B.* will not be a commencement of the risk described in the policy; for the voyage insured must be considered as a voyage from *any one* of the places of departure, but not from one to another of them (*a*).

Sect. VI.

Whether the Risk may be changed after the Policy is subscribed.

Changing the nature of the risk after the policy is effected, determines the contract.

IF, after the insurance is effected, any thing be done by the insured to alter the nature of the risk, this must be done with the consent of the insurers, otherwise it will avoid the contract: As if, after a policy is effected on a merchant ship, letters of marque be put on board, and from a mere private trader, she be changed into a ship of war, with power not only to defend herself, but also to cruise and take prizes; this is such an alteration in the condition of the ship, that the risk must be materially changed from that which the underwriter took upon himself, and consequently the contract is thereby determined.

Denison v. Modigliani, 5 T. R. 580.

A ship, insured as a private trader, afterwards takes letters of marque, without the consent of the underwriters:—This discharges the underwriters, though no use be made of them.

As, where a ship and cargo were insured on a voyage 'from *Liverpool* to *Oporto*:'—The ship sailed but was driven back by contrary winds. She was then detained some time by an embargo, and before this was taken off, a war with *France* having broke out, the insured were desirous of putting guns on board, and taking out letters of marque for her: But fearing that this might vacate the policy, they asked permission of the underwriters,

(*a*) Vid. *Sellar v. M'Vicar*, 1 New Rep. 23. inf. ch. 8. s. 3.

derwriters, who agreed to their putting guns on board; but peremptorily refused to permit her to take letters of marque. Notwithstanding this refusal, she was furnished with letters of marque, and after waiting some time for them, sailed on her voyage, and was taken by a *French* privateer.—In an action on the policy, it was insisted on the part of the underwriters, that the ship, having sailed with letters of marque, against their consent, the risk was altered, and the policy thereby vacated.—The insured, on the other hand, said that the letters of marque were not intended to be used in the *voyage insured*, but only in the *voyage home*; and that, in fact, the ship had not deviated in any respect.—The jury, being satisfied of this, found a verdict for the plaintiff.—But the court set this verdict aside, and determined that a ship, insured as a private trader, had no right to carry letters of marque, without the consent of the underwriters; for they afford a strong temptation to the captain to deviate in quest of prize, and essentially alter the condition of the ship from that of a mere private trader, which materially varies the nature of the risk, and consequently discharges the underwriters.

Observations on this case.

The only ground upon which this decision can be at all sustained, is, that the letters of marque being on board afforded a temptation to the captain to deviate from the voyage insured in quest of prize. It is now a settled point, that an *intention* to deviate, not carried into effect, does not determine the policy. Still less I should conceive, ought a *temptation* to deviate, which may or may not produce even an *intention* to deviate, to affect the contract. Nor have the underwriters reason to object to the captain's being tempted to deviate, since the effect of his yielding to such a temptation would only be to discharge them from all subsequent responsibility. It was found by the jury, in this case, that the letters of marque were taken on board, not for the purpose of being used in the outward voyage, but only in the homeward, which was not the voyage insured; and that, in fact, the ship did not deviate.—In the following case, the same court determined, that the having letters of

marque

marque on board, but without the proper certificate of clearance, without which the captain was unable to make any *legal* use of them, did not vacate the policy. This decision, it may be presumed, proceeded on the idea that the having these defective letters of marque on board, afforded no temptation to the captain to deviate in quest of prize; and yet it will be seen, that the plaintiff recovered in that case, for a loss by barratry, in consequence of the captain's having cruised in quest of prize, under colour of the defective letters of marque. The distinction seems to be, between the letters of marque which afford a legal, and those which afford an illegal, temptation to cruise. If we were permitted, however, to judge by the event, we might conclude that those of the latter description afforded the strongest temptation.

Moss v. Byrom, 6 T. R. 379.

Letters of marque were taken out, but without the proper certificate, and only to entice seamen to enter, without any intention of cruising:—This did not vary the risk, so as to avoid the policy, even though the captain, against his instructions, cruised and took prizes.

That was the case of an insurance on goods, 'From 'the *Bahama Islands* to *Liverpool*,' on board a ship which had been chartered for a trading voyage from *Liverpool* to the *Bahamas*, and back.—The ship, about the middle of *May* 1793, having completed her lading, and having taken in guns and ammunition, for the purpose of defence, was ready to sail, but wanted seamen. The insured could procure none to enter, on account of a notion prevailing among them, that the enemy had threatened to treat as pirates the crews of every vessel which made any resistance, unless she had letters of marque, and they knew that this ship had guns on board for the purpose of defence, but no letters of marque. The time pressing much for the departure of the vessel, the insured, in order to quiet the apprehensions of the seamen, and to induce them to enter, procured letters of marque, *but without any intention to make use of them for the purpose of cruising or making reprisals*. No certificate of clearance was taken out, in pursuance of the stat. 33 *G*. III. c. 66. s. 15. without which the letters of marque are declared void; and the captain subjected to a penalty for departing without it; and it was a part of the written instructions to the captain, before he sailed, to proceed to *Liverpool* with all expedition, agreeably to the charter-party, and no mention was made of the letters

of marque. A few days after the vessel sailed, the captain intimated an intention to cruise for prizes, to which some of the crew objected, as not being within the scope of their engagement; the majority, however, agreed to it, and they soon fell in with an *American*, whom they plundered, and afterwards released. They then cruised for some days longer, out of the course of the voyage, and captured a vessel of the enemy, which the captain sent into *Bermudas*, and followed thither himself, where he libelled his prize in the court of admiralty, in the name of himself and his owner; and shortly after, during his stay there, his ship was driven ashore in a storm, and the cargo lost. He directed that no mention should be made in the log-book of his cruising for prize.—In an action on the policy, the jury found for the insured, as for a loss by the *barratry of the master*.—The court was moved to set this verdict aside; 1st, because this was not barratry, in as much as the act of the captain was done with a view to benefit, not to prejudice his owner; 2dly, because the taking of letters of marque, without the knowledge or consent of the underwriters, varied the risk, and avoided the policy; and for this, the above case of *Denison* v. *Modigliani* was relied on as a clear authority in point. And it was argued, that though the insured instructed the captain not to use the letters of marque; yet it was plain that they did vary the risk, because in fact they tempted him to do what he did. That it was true the same objection had been overruled in *Denison* v. *Modigliani*; but the present was a stronger case, because the captain did give way to temptation, and made use of the power which the insured put into his hands; whereas, in that case, the captain did not act under the letters of marque, but the bare possession of them was held sufficient to vacate the policy. But, at any rate, the policy was avoided before any barratrous act committed, by the single act of the captain's going out of his way to stop the *American* ship.—But the court determined that the insured were entitled to recover on the ground of barratry. They held that the stopping and plundering the

American

American ship was of itself an act of barratry in the master, independently of his taking the prize, being contrary to his duty to his owners, and to their prejudice, because they had stipulated by the charter-party, that the ship should sail directly to *Liverpool*, and were therefore liable for any damage that might happen in consequence of that deviation; and, that, though the captain might conceive that what he did was for the benefit of the owners, yet if he acted contrary to his duty to them, it was barratry.—Lord *Kenyon* said, that the principles on which the case of *Denison* v. *Modigliani* was decided, were new and went to the extreme verge; yet, that the present case was distinguishable from that, where there were *legal* letters of marque to enable the captain to take prizes; but here the letters of marque were not obtained for the purpose of enabling the ship to cruise, but to procure seamen; and when they were procured, they could have no legal effect, and then it was the same as if no letters of marque had been on board.

CHAP. VIII.

Of the Policy.

HAVING, in the foregoing chapters, ſhewn who may be parties to this contract, what may be the ſubject matter of it, in what ſhip, for what voyage, upon what intereſt, and againſt what riſks, it may be made, we now proceed to ſhew how, and in what form, the contract itſelf ſhall be made.

This contract is uſually compounded of the common policy adapted to each particular caſe, with certain ſtipulations or warranties, which are occaſionally inſerted in it purſuant to the agreement of the parties, and of extrinſic repreſentations.

For the ſake of perſpicuity, we will examine each of theſe in a ſeparate chapter; beginning with the policy. —Under this head, we will conſider,

I. *The Nature and Properties of the Policy;*
II. *How, and by whom, it may be effected;*
III. *The Form and Requiſites of it;*
IV. *In what Caſes it may be altered or corrected.*

Sect. I.

Of the Nature and different Sorts of Policies.

The policy is a written inſtrument, by which the contract of inſurance is effected and reduced into form (*a*).

(*a*) Previouſly to the effecting of the policy, a ſlip of paper containing a ſhort memorandum of the propoſed inſurance, is ſometimes offered to the underwriters, and ſubſcriptions taken upon it until a competent number is obtained. It would ſeem that a repreſentation made at the time of ſubſcribing this ſlip, but not repeated when the policy itſelf is ſubſcribed, will not affect the contract. Vid. *Dawſon* v. *Atty*, 7 *Eaſt* 367.

—The

—The term policy of insurance, or *assurance*, as it is sometimes called, is derived from the *Italian*, *polizza di assecurazione*, or *di securanza*, or *di securta*, and in that language signifies a *note* or *bill of security*, or indemnity.

As the premium, which is the consideration of the promise made by the insurer, is paid, or supposed to be paid, and the receipt of it acknowledged, at the time the policy is subscribed, the promise of the underwriters is always considered as being made upon a consideration *executed*, and therefore the policy contains only the promise of the underwriters, without any thing in nature of a counter-promise on the part of the insured. Signed only by the insurers.

Policies, with reference to the *reality of the interest* of the insured, are distinguished into *interest* and *wager* policies; with reference to the *amount* of the interest, into *open* and *valued*. Different sorts of policies.

An *interest policy* is where the insured has a real, substantial, assignable, interest in the thing insured; in which case only it is a contract of indemnity.

A *wager policy* is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. Insurances of this sort are usually expressed by the words, "*interest or no interest*," or, "*without further proof of interest than then policy*," or, "*without benefit of salvage to the insurer*."

An *open policy* is where the amount of the interest of the insured is not fixed by the policy; but is left to be ascertained by the insured, in case a loss shall happen.

A *valued policy* is where a value has been set on the ship or goods insured, and this value inserted in the policy in nature of liquidated damages, to save the necessity of proving it, in case of a total loss: For, by allowing the value to be thus inserted in the policy, the insurer agrees that it shall be taken as there stated.—This value is, or ought to be, the real value of the ship, or the prime cost of the goods, at the time of effecting the policy (*a*), to-

(*a*) 2 *Bur.* 1171.

gether

gether with the amount of the premiums and other expences of the insurance.

There may be many cases, however, in which an insured may have an interest in the thing insured, but the amount of which, it may be difficult or impossible for him to ascertain at the time when it is necessary to insure: As where *returns* are expected from abroad, the exact value, and even the nature of which are uncertain; so, in the case of a *prize*, where the real value of it can only be ascertained when it is brought into port and sold; and in every instance where the owners have been prevented from receiving regular or satisfactory advices from which the true amount of their interest might be ascertained.—In these and similar cases, the insured must put a value upon the things insured in the best manner he can, according to his means of judging of it; and it seems proper, and is become customary, in such cases, to insert a clause of valuation in the policy, which specifies a given sum as the value of the interest of the insured.—Thus; "*In case* "*of loss, the said ship is valued at* 2000l. *and the said goods* "*at* 5000l.:"—Or, it estimates the value as equal to the sums subscribed. Thus;—"*The said ship, goods, &c. va*"*lued at the sum insured.*"

The value in such policy should be only the prime cost.

The only effect of the valuation is, that it fixes the amount of the interest in the same manner as if the insurer were to admit it at a trial; and for every purpose it must be taken, that the value was fixed so as that the insured might have an indemnity only, and no more.—If it be undervalued, the merchant himself runs the risk of the deficiency. If it be greatly over-valued, it must be with a bad view; either to a fraudulent loss, or to game contrary to the stat. 19 *G.* II. c. 37 (*a*).

Upon a valued policy, the amount being admitted, it is sufficient to prove *some* interest.

The value in the policy being always considered as the fair amount of the prime cost and expences of the insurance, the insured needs only to prove *some interest*, to take it out of the statute, because the insurer has admitted the amount; and if more were required, the agreed valuation

(*a*) Per Lord *Mansfield* in *Lewis* v. *Rucker*, 2 *Bur*. 1171.

would

would signify nothing (*a*).—And though it is said, in the case of *Harman* v. *Vanhatton* (*b*), that the law allows a man, having *some* interest in a ship or cargo, to insure more, or *five times as much*, because a merchant cannot tell how much, or how little, his factor may have in readiness to lade on board his ship: Yet it is not there said, that in case of loss, the insured might recover more than the amount of the real interest. And in a subsequent case, in the year 1716, the Lord Chancellor ordered the insured, in a valued policy on goods, to discover what goods he had on board. *Le Pypre v. Farr, 2 Vern. 716.*

Distinction between a valued policy and a wager.

Though a valued policy, when thus fairly made, is distinguishable from a wager in this, that the former is founded on real interest, the amount of which is agreed by the policy, in the latter the insured has avowedly no interest at all: Yet, it must be owned that a valued policy frequently partakes of the nature both of a policy on interest, and of a wager. On the one hand, it supposes a *bonâ fide* interest in the insured; on the other, this interest is not always expected to be exactly commensurate with the amount of the insurer's obligation. There is a real interest it is true; but this frequently falls far short of the nominal value in the policy; and it too often happens that wager policies are effected under colour of a small interest, and in the form of valued policies, and the beneficial effects of the stat. 19 *G.* II. c. 37. are thereby defeated.

The value in the policy is only *primâ facie* evidence of the interest.

The value in the policy, however, ought only to be considered as *primâ facie* evidence of the amount of the interest of the insured; for though this value is admitted by

(*a*) Per Lord *Mansfield*, ib.—*Magens*, who seems to have written his essay on insurances before the stat. 19 *G.* II., c. 37. though it was published after, says that in the case of a valued policy, the insured has nothing to prove, "*save that the goods* "*valued were put on board.*"—Vid. 1. *Mag.* 28, 35. If this was the practice, while insurances without interest were supposed to be legal, how much more necessary to be observed now that they are declared by statute to be illegal, and are known to be highly detrimental to commerce.——(*b*) Sup. 124.

the insurer, yet, as he admits it upon the mere representation of the insured, if he afterwards find that this was fallacious, that it was fictitious, and only a cover for a wager, it cannot be supposed that he is so far concluded by his admission, as not to be at liberty to dispute the value, and shew by evidence that it was a mere evasion of the act.

How this is regulated by the *French* law.

By the law of *France*, the value in the policy is taken to be true, as against the insurer, till he prove the contrary (*a*). *Valin*, indeed, says that an insurer cannot be permitted to alledge fraud in the value specified in the policy, so as to be let in to shew a new valuation, without shewing that the value in the policy is at least *one-fourth too high* (*b*). *Pothier*, on the contrary, holds that the value is only to be taken as just, till impeached by the insurer; who may be let in to prove the valuation to be too high, even where there is an express clause in the policy to preclude such inquiry; such clauses being always held to be illegal (*c*), the rule of the civil law being, *Conventio, ne dolus præstetur, rata non est* (*d*).—If the exception to the valuation prevail, it either reduces the sum insured to the value of the goods, or, if fraud appear in the valuation, avoids the policy, and bars the demand of the insured: That is, if the insured *knew* that the goods were over-valued; or even where there is a *presumption* of fraud, arising from the concealment of a former insurance, the policy would be void, (*e*). For by the ordinance of the marine (*f*), the insurance shall be presumed fraudulent, if the insured do not declare all he has insured; or even if he demand payment beyond the value of the effects insured For the moment the insured would turn a loss to his own advantage, and seek to recover more than he put in risk, with whatever good faith he might have made the original valu-

(*a*) *Valin* h. t. art. 64. p. 136. *Pothier*, h. t. n. 151. 159. *Emerig.* tom. 1. p. 271, 2.——(*b*) Vid. *Valin* art. 64. h. t. *Le Guidon*, ch. 2. art. 13.——(*c*) *Pothier*, h. t. n. 148. 156——(*d*) *Dig.* lib. 13. tit. 6. n. 17.——(*e*) *Pothier*, h. t. n. 157.——(*f*) Ord. de la mar. h. t. art. 53, 54, 55.

ation, he is guilty of fraud (*a*). But however the excess may have originated, it is incumbent on him to shew that it proceeded from some error on his part, or on the part of his agents. *Pothier* and *Valin* say, however, that when the transaction admits of doubt, the judges, to mitigate the severity of the law, are more inclined to impute the fault to error than to fraud; and therefore, unless fraud be made evident, a justification is readily received (*b*).

In *England*, if the policy be meant as an indemnity, the valuation will not be scrupulously inquired into.

In *England*, as we have already seen, we are not quite so rigid. Where a valued policy is *bonâ fide* meant as an *indemnity*, the courts will not enquire very minutely whether the valuation be very near the true interest of the insured. A small excess ought not to be regarded. Considering the uncertainty of every valuation, a scrupulous exactness in this point, would only occasion endless litigation. But, on the other hand, if the interest proved be a mere cover for a wager every court must pronounce the policy to be void, within the meaning of the statute (*c*).

But if it be only a cover for a wager, it will be void.

It is only in the case of a total loss, that there is any material difference between an open and a valued policy. In the former, the value must be proved, in the latter it is admitted. But in the case of a partial loss, the like inquiry into the true amount of such loss is to be made, whether the policy be of the one sort or of the other. For if this were not to be done in the case of a valued policy, the consequence would be, either that every partial loss must be considered as a total one, or else that nothing should be deemed a loss at all, unless it were a total loss (*d*).

The only difference between an open and a valued policy is in the case of a total loss.

Sect. II.

How, and by whom the policy may be effected.

Insurance brokers.

IT seldom happens that there is any direct communication between the insured and the insurer. The business of negotiating insurances with the underwriters,

(*a*) *Emerig.* vol. 1. p. 271 272.——(*b*) *Valin*, art. 23. p. 67. *Pothier*, h. t. n. 78.——(*c*) Vid. sup. c. 4. § 2.——(*d*) Vid. 2 *Bur.* 1171.

and of getting policies effected, is usually transacted by brokers who make this branch of business their profession.

Nature of their dealings.

These insurance brokers, from the importance of their employment, ought to be, and indeed generally are, persons of great respectability and honour, in whom unlimited confidence may be safely reposed. To the broker the merchant looks for the regularity of the contract, and a proper selection of responsible underwriters. To him also the underwriters look for a fair and candid disclosure of all material circumstances affecting the risk, and for the payment of their premiums.

Account between the broker and the underwriter.

There is usually an open account between each broker and every underwriter with whom he has much dealing, in which the broker makes himself debtor to the underwriter for all premiums, and takes credit for all losses to which the underwriter is liable, and which the broker is authorized to receive. Indeed it is generally understood that, by the usage of trade in *London*, the underwriters give credit only to the broker for their premiums, and can resort only to him for payment; and that he alone, and not the underwriters, can recover the premiums from the insured. This point, however, has never been settled by any judicial determination. Perhaps it would be for the interest of all parties if this rule were fully established, and constantly adhered to.

His liability for premiums extends only to legal insurances.

But the liability of the broker to the underwriter for premiums only extends to cases of legal insurance. And therefore where the broker, in his account delivered to the underwriter, gave credit for the premium of an illegal re-insurance, the underwriter cannot maintain an action for this premium, especially if it appear that the money had not been actually paid by the insured to the broker (*a*).

He has a lien on the policy in his hands for the general balance.

As the brokers are sometimes in advance to their employers, the law has given them a lien upon the policies in their hands for the general balance due to them in their character of brokers. And if a broker should part with the possession of a policy, whereby he loses his lien; yet

(*a*) *R. Edgar* v. *Fowler*, 3 *East*, 222.

if

if he get it into his hands again, for whatever purpose, his lien revives, and he may again hold it as a security for the general balance (*a*).

But though the underwriter thus looks to the broker for his premium, and though the broker in his account with the underwriter, takes credit for the losses and returns of premium which he is authorized to receive from the underwriter; yet, such losses are not to be looked upon as a *debt* from the underwriter to the broker.

Though the premium be a debt due from the *broker*, yet a loss is only due to the *principal*.

Therefore, where the assignees of a bankrupt who had been a policy broker, brought an action against the defendants, who were agents or factors to various correspondents abroad, and the defendants claimed, by way of set-off, the balance of an account between them and the bankrupts, in which they debited themselves for various premiums of insurance, made on behalf of their correspondents; and took credit for all losses and returns of premiums upon these insurances. The defendants had no commission *del credere*, and none of their correspondents were insolvent; but to all their correspondents, except one, they were in advance on account of insurances.—Upon this case, the court held that though credit for the premiums must be given to the broker, because the underwriters know nothing of the principals; yet, that they could not set off the losses or returns of premium due to the principals, and which *they* only could sue for, against a debt due from the defendants to the bankrupt.

Wilson and others assignees v. *Creighton* and others, B. R. M. 23 G. III. MS.

In a subsequent case, where the action was brought by the assignees of an underwriter against the factor, it was determined, that the defendant might set off losses upon policies subscribed by the bankrupt, and due to the defendant's correspondents: But there the defendant had a commission *del credere*, which Lord *Mansfield* said made him liable at all events to his correspondents for losses, without first bringing an action on the policy against the underwriter.

Grove v. *Dubois*, B. R. *Hil.* 26 G. III. MS. 1 T. R. 112. S. C.

(*a*) R. *Whitehead* v. *Vaughan* in B. R. Tr. 25 G III. and *Parker* v. *Carter*, in C. B. Tr. 1788. *Cooke*'s Bank. Laws, 4th ed. p. 579.

 The

Whe ethe underwriters give credit to the broker only the broker may recover the premiums from the insured.

The following case seems to prove, that where it is the practice for the underwriters to give credit to the broker only, the broker may maintain an action against the insured for the amount of the premiums of insurances effected for him, even though these premiums remain due to the underwriters.

Airy and others, assignees of *M*—*t*— v. *Bland*, at G. H. after Trin. 14 G. III. MS.

An action was brought by the assignees of a broker at *Newcastle*, to recover the premiums of an insurance effected by him for the defendant on the ship *Jason*.—The question was, whether the credit was given to the insured or the broker. It was proved that the underwriters upon this policy told the broker that they should look to him for their premiums, and would have nothing to do with the insured; and several *London* insurance brokers being examined, swore they understood that the underwriters looked to them only, and that not once in ten times did the underwriters know who the insured were; and in case of failure, the underwriters came upon the effects of the broker, and the broker upon those of the insured.—Lord *Mansfield*, who tried the cause, said,—"The plaintiff's case is stronger than any reference to the general usage in *London* could make it; for the parties act by a specific rule, which they suppose to be the rule in *London*; and if the usage in *London* were doubtful, still the plaintiffs would be entitled to recover."

If a broker engage another to effect policies, the underwriters may resort to the first broker for all premiums not paid over to the second broker.

Yet, if the broker employed by the insured employ a broker in another place, under a commission *del credere*, the underwriters may resort to the first broker for the premiums received by him, and not paid over to the broker who effects the policies, though they not only gave credit to that broker, but made him an allowance for becoming personally responsible for the premiums, and even after they have taken his notes for their respective balances of premiums, according to their usual course of dealing.

... v. *Wilson*, East. 38 ... I. MS.

Broker at L. ... orders to B. broker at N., to

As where the defendant *Wilson*, an insurance broker at *Liverpool*, entered into an agreement with *Stoddart*, carrying on the same business at *Newcastle*, to transmit all orders for insurances, to be effected at that place to

Stoddart,

Stoddart, who was to charge *Wilson* with the premiums, and *Wilson* was to stand *del credere* to him for such premiums, to pay all losses, deducting the amount of premiums due from the persons entitled to such losses, and to allow the defendant 2*l.* 10*s.* *per cent.* upon the gross amount of the premiums of insurances thus effected, and also 2*l.* 10*s.* *per cent.* upon the net amount of such premiums, after deducting the returns made on the policies, and to give him twelve months credit for such premiums; but that, if *Wilson*, the defendant, should receive any sum for premiums previous to such credit, it should be immediately remitted to *Stoddart*. Under this agreement a number of policies were effected by *Stoddart* at *Newcastle*, many of which were underwitten by the plaintiff *Robson*. At *Newcastle* it is usual for the underwriters to give credit to the broker for the premiums, and he accounts with each underwriter at the end of every year, and gives his notes at three, six, and nine months for the balance due to each, deducting 5*l.* on every 105*l.* of the gross premiums as commission, and 5*l.* *per cent.* more on the net premiums, exclusive of returns, as a consideration for his becoming personally responsible for the net premiums, and sometimes 2*l.* 10*s.* *per cent.* for prompt payment. On the 13th of *February* 1797 the plaintiff settled with *Stoddart* to the 31st of *December* 1796, and received from him three notes for the general balance of the premiums of the preceding year. On the 10th of *May* 1797 the defendant *Wilson* settled accounts with *Stoddart*, and there was then a balance of 4,094*l.* 12*s.* 8*d.* in favour of *Stoddart*. On the 8th of *June* 1797 *Stoddart* became a bankrupt, at which time 79*l.* remained in the hands of the defendant *Wilson* for premiums upon policies effected at *Newcastle* by *Stoddart*, by his order, and underwritten by the plaintiff *Robson*, who brought his action against the defendant *Wilson* to recover that sum, as being money had and received to his use; and the question was, whether the plaintiff, though he had *Stoddart's* notes for the balance due to him, was entitled to recover from the defendant the 79*l.* in his hands; or, in other words, whether the

effect insurances there upon a commission *del credere*. *B* after giving the underwriters at *N.* his notes for their balances of premiums, becomes bankrupt:—The underwriters at *N.* have a right to resort to *A.* for all premiums received by him and not paid over to *B.*

money remaining in the hands of the defendant, being the balance of premiums settled between him and *Stoddart*, ought to be paid to the underwriters respectively, or to *Stoddart*'s assignees.—The court were clearly of opinion in favour of the underwriters.—Lord *Kenyon* said:—"The plaintiff has underwritten several policies in respect of which premiums became due to him, but which have not been paid to him. These policies were effected through the medium of *Stoddart*, the agent of the defendant. If the defendant had paid *Stoddart*, or if he had been creditor of *Stoddart*, he could not have been called upon in this action. But here there is a considerable balance in *Stoddart*'s favour. Upon *Stoddart*'s bankruptcy 79*l.* remained, and still remain in the defendant's hands, which ought to have been remitted to *Stoddart*, for the payment of premiums upon policies which were effected by his orders. Where a factor has received money belonging to his principal, and it becomes blended with his own estate, and cannot be distinguished from it, the principal must come in with the general creditors. But here it is money clearly distinguishable from the bankrupt's estate. Before it is paid to the factor *del credere*, he becomes a bankrupt; it is therefore no part of the general fund, and the principal has a right to claim it."

Agent.

When the merchant happens to reside at a distance from the place where he means to be insured, the policy is usually effected by the intervention of his agent or correspondent there, who, if he be not himself a broker, employs one, and gives him all necessary instructions, with which he has been furnished for getting the insurance effected.

Authority of an agent.

To make a man an agent in such case, he must either have express directions from the principal to cause the insurance to be effected, or else it must be a duty arising from the nature of his correspondence with the principal. And no general authority which he may have in relation to a ship or goods, will make him an agent for the purpose of insuring on behalf of the parties interested. Therefore a ship's husband, regularly appointed by deed executed

executed by all the owners, with power to advance, lend, &c. to make all payments, and to retain all claims, &c. has no right to make insurance for all, or any of the part owners, without a general direction from all, or a particular direction from each (*a*).

The office of ship's husband does not necessarily give him authority to insure.

Though one man cannot, in general, compel another against his consent, to become his agent to procure an insurance to be effected for him; yet there are three cases, wherein an order to insure must be complied with. —1st. Where a merchant abroad has effects in the hands of his agent or correspondent here, he has a right to expect that the agent will comply with an order to insure; because he is entitled to dispose of the money in his agent's hands in what manner he pleases.—2dly. Where the merchant abroad has no effects in the hands of his correspondent here; but the course of dealing between them has been such, that the one has been used to send orders for insurance, and the other to execute them; the former has a right to expect that his orders for insurance shall still be obeyed, unless the latter give him notice to discontinue that course of dealing.—3dly. Where the merchant abroad sends bills of lading to his correspondent here, with an order to insure, as the implied condition on which he is to accept the bills of lading; and the correspondent accepts the bills of lading, he must obey the order; for it is one entire transaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition (*b*).

Three cases in which an agent is bound to comply with an order to insure.

1st. Where he has effects in his hands.

2dly. Where he has been in the practice of making insurances, and has given no notice to discontinue.

3dly. When he accepts bills of lading sent him on condition to insure.

To the office of agent or broker, great responsibility attaches; and in the execution of it, therefore, it is the duty of each to conduct himself with the greatest fidelity, punctuality, and circumspection. For, in this, as in all other cases, where a man, either by an express or implied undertaking, engages to do an act for another, and he either wholly neglects to do it, or does it improperly or unskilfully,

The agent, as well as the broker, is answerable to his employer for negligence or unskilfulness.

(*a*) R. *French* v. *Backhouse*, 5 *Bur.* 2727.——(*b*) Per *Buller*, J. in *Wallace* v. *Tellfair*, at N. P. 2 T. R. 188. n. and in *Smith* v. *Lascelles*, 2 T. R. 188. *Ashhurst* and *Grose* Js. concurring.

unſkilſully, an action on the caſe will lie againſt him to recover a ſatisfaction for the loſs or damage reſulting from his negligence, careleſſneſs, or want of ſkill.

If the agent limit the broker to too ſmall a premium, and ſo prevent the inſurance from being effected, he is anſwerable.

Therefore, if a merchant here accept an order from his correſpondent abroad to cauſe an inſurance to be made, but limit the broker to too ſmall a premium, in conſequence of which no inſurance can be effected; he is liable to make good the loſs to his correſpondent (*a*).—For though it is his duty to get the inſurance done at as low a premium as poſſible, yet he has no right to limit the premium, ſo as to prevent the inſurance from being effected.

Even a voluntary agent is liable, if he take any ſtep in the buſineſs.

Even if a perſon voluntarily undertake to procure an inſurance to be effected, without the expectation of any remuneration for his trouble; though, perhaps, he is not bound to perform his undertaking, yet, if in fact, he do proceed to execute it, he will be anſwerable for any negligence or unſkilfulneſs in the conduct of it.

Wilkinſon v. *Coverdale*, 1 *Eſp.* Rep. 74.

A. gratuitouſly offers to get a fire policy renewed and tranſferred to *B.* but omits to get the aſſignment made: *A.* is liable for any loſs occaſioned to *B.* by this omiſſion.

Thus:—In an action on the caſe for negligence, it was ſtated in the declaration, that the plaintiff, in *Auguſt* 1792, purchaſed certain premiſes of the defendant, who had then a ſubſiſting policy from the *Phœnix* fire office, from *December* 1791 to *December* 1792; that the defendant undertook to get this policy renewed on account of the plaintiff, and regularly transferred to him; that he did, in fact, renew the policy and paid 16*l.* which he charged to the plaintiff, but neglected to get it transferred from himſelf to the plaintiff, by the proper indorſement at the fire office; in conſequence of which, the plaintiff, who ſuſtained a loſs by fire, was unable to recover on the policy.—On the trial, it was admitted on the part of the plaintiff, that there was no conſideration moving from the plaintiff to the defendant for his undertaking, but that the defendant had gratuitouſly undertaken to get the policy renewed and transferred.—On this being admitted, lord *Kenyon*, who tried the cauſe, expreſſed a doubt whether any action could be maintained on ſuch

(*a*) Per *Buller* J. in *Wallace* v. *Tellfair*, at N. P. 2 T. R. 188. n. Vid. *Delaney* v. *Stoddart*, 1 T. R. 22.

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an undertaking.—To remove this doubt, the plaintiffs counsel cited *Wallace* v. *Tellfair*, a case similar to the present, in which Mr. Justice *Buller* had ruled at *nisi prius*,—"that though there be no consideration for one party's undertaking to procure an insurance to be effected for another; yet, that where a party voluntarily undertakes to do it, and proceeds to carry his undertaking into effect, by getting a policy underwritten, but does it so negligently or unskilfully that the insured can derive no benefit from it; in that case an action will lie against him."—Lord *Kenyon* acquiesced in this distinction, and suffered the cause to proceed: But the plaintiff failing in the proof of any promise by the defendant to procure insurance to be renewed and transferred as stated in the declaration, he was nonsuited.

Seller v. *Work*, at N P. after Hil. 1801. MS.

A broker employs another, but omits to give him all the instructions he is furnished with: He shall answer for the loss occasioned by his omission, though he derived no profit from the transaction.

So, where the defendant, who was a policy broker in *London*, employed another broker in *London*, by the directions of the plaintiff who resided at *Liverpool*, to effect a particular policy, but omitted, through inadvertence, to deliver to him, with his other instructions, a letter from the plaintiff, containing material information respecting the time of the ship's sailing, and which ought to have been shewn to the underwriters.—A loss having happened, the underwriters refused to pay on account of this concealment; and upon this ground the plaintiff, in an action on the policy against one of the underwriters, was nonsuited.—The plaintiff brought the present action against the defendant for the loss occasioned by his negligence in not delivering the letter to the broker who effected the insurance.—It was objected at the trial that as the defendant himself had no sort of remuneration for his trouble, an action could only be maintained against him upon the ground of *wilful negligence*.—But lord *Eldon*, who tried the cause, held clearly, that the defendant having taken upon himself to employ the other broker, he was bound to communicate to him all the instructions he had received, and having omitted to do this, he was liable for all the consequences.—In settling the amount of the damages in this case, the plaintiff insisted on including the cost of the action brought upon the policy.—But lord *Eldon* said that there was no necessity to

The defendant is not liable for the costs of an action brought on the policy, unless it was brought by his desire.

to bring that action in order to entitle the plaintiff to recover in the present case; and as it did not appear that the action upon the policy was brought by the desire, or with the concurrence, of the present defendant, he ought not to be charged with the costs of it.

The agent must also act fairly by the insurer.

But it is not only the duty of the agent, in transacting the business of insurances, to conduct himself with fidelity and punctuality towards his employer; he is also bound to observe the strictest veracity and candour towards the insurer. Indeed he cannot be a faithful agent to the one, without dealing honourably with the other;

Any fraud or concealment by him will avoid the policy, even though the insured be innocent of it.

for any concealment, misrepresentation, or other fraud committed by the agent will have the same effect in avoiding the policy, as if it were committed by the insured himself, even though it be done without his privity or knowledge (*a*), or ignorantly (*b*), or even contrary to his directions. For it is a maxim of law that, if one of two innocent persons must suffer by the fraud or negligence of a third, the loss shall fall on him who trusted the third person.

In such action the plaintiff shall recover the same as in an action against the insurer.

In an action against an agent or broker for negligence or unskilfulness in effecting an insurance, the plaintiff is entitled to recover to the same amount as he might have recovered against the underwriters had the policy been properly effected. But he can only recover what, *in point of law*, he might have recovered on the policy; and not what the indulgence or liberality of the underwriters might probably have induced them to pay (*c*).—And, in such an action, the agent may avail himself of every defence, such as fraud, deviation, non-compliance with warranties, &c., which the underwriters might have set up in an action on the policy (*d*).

But if the agent act in the usual manner, it will be sufficient.

But where the agent uses due diligence, and does what is usual to get the insurance effected, that is sufficient:

(*a*) R. *Stewart* v. *Dunlop*, post. c. 10. s. 1.——(*b*) R. *Fitzherbert* v. *Mathe*, 1 T. R. 12. post. c. 9. s. 1.——(*c*) R. *Webster* v. *De Tastet*, 7 T. R. 157. sup. 90.——(*d*) Per Lord *Kenyon*, in *Wilkinson* v. *Coverdale*, at N. P., after M. 34 G. III.

As if he ſend to *Lloyd's*, and the underwriters refuſe to take the riſk, becauſe the ſhip was not regiſtered; and upon this he ſends to *Newcaſtle*, and get it done there: He has done all that could be required of him; and no action will lie againſt him for not inſuring in *London*, eſpecially if the owner has adopted his acts (*a*).

An agent or broker ought not be an underwriter.

There are many reaſons why an agent or broker ought not to be an underwriter on any policy which he effects as broker. He becomes too much intereſted to ſettle with fairneſs the rate of premium, the amount of partial loſſes, &c. And though he ſhould not, himſelf, create any unneceſſary delay or obſtacle to the payment of a loſs, he will not be over anxious to remove the doubts of others. Beſides, he ought not, by underwriting the policy, to deprive the parties of his unbiaſſed teſtimony, in caſe of diſpute. For though there may be no legal objection to his *competency*, as a witneſs for the other underwriters (*b*), it is impoſſible that his *credit* ſhould be altogether free from ſuſpicion. The principal, in ſhort, can never place any reliance in one who makes himſelf an adverſe party, and who is, at the ſame time, above all others, in a capacity to abuſe his confidence.

The inſured may maintain trover for the policy, and recover as againſt the underwriters.

The policy, when effected, becomes the property of the inſured, in whoſe hands ſoever it may happen to be; ſubject, however, to any fair or equitable *lien* which the holder may have upon it: And if it be wrongfully withheld, the inſurer may maintain an action of trover; and in ſuch action he ſhall prove his loſs, and recover in like manner as in an action againſt the inſurer.

The broker has a *lien* on the policy for the general balance, unleſs his employer acts as agent.

The broker, however, has a *lien* on the policy for the amount of his general balance againſt his employer. But where the employer acts as agent for a third perſon, the broker cannot retain the policy in his hands for the general balance, as between him and ſuch agent, but only for the particular premiums paid upon ſuch policy, though the inſurance be made in the name of the agent. But where the agent, acting under a *del credere* commiſſion, inſures in

But if the broker be not informed that his employer acted as agent, his *lien* will be good.

(*a*) Per *Buller* J. at N. P. in *Smith* v. *Cologan*, 2 T. R. 118. n. —(*b*) Vid. *Bent* v. *Baker*. 3 T. R. 27.

in his own name, and does not disclose to the broker that he acts as agent, the broker is entitled to retain in his hands the policy, or any money received from the underwriters upon it, for the general balance, as between him and the agent (*a*). But if the broker, from the nature of his instructions, have reason to conclude that his employer acted as an agent for a third person, and not on his own account, he will have no lien on the policy, or on any money received under it, for his general balance against such agent.

Mann v. Henderson, 1 *East*, 335.

Where the broker, from his instructions, has reason to conclude that his employer acted as agent, he cannot retain for his general balance, though the policy be effected in the name of his employer.

Therefore, where a *British* subject in time of war, received orders from a neutral foreigner, his correspondent, to effect an insurance for him, employed for this purpose a broker, whom he had been in the habit of employing, to effect insurances on account of others as well as for himself, but informed him that the property was *neutral*; and accordingly the policy, though effected in the name of the agent, *warranted the property neutral*.—An average loss having happened, the broker received this from the underwriters; and the agent having failed, the principal brought an action against the broker to recover the amount of the money received under the policy, as money received to his use. It was contended on the part of the broker, that he was entitled to retain the money in his hands for the general balance due to him from the agent. —Lord *Kenyon*, who tried the cause, directed a verdict for the plaintiff for the amount of the average loss, deducting the premiums paid upon this policy, being of opinion that the information from the agent to the broker, that the property was *neutral*, was a sufficient indication to him that his employer was only acting as agent, though the name of the principal was not then disclosed; and, consequently, that the broker had no lien for his general balance against the agent, but only for the amount of the premiums paid on this policy.—Upon a motion for a new trial the court fully concurred in this opinion.

If an agent pretend that he has effected a policy, trover will lie against him for it, though none has been effected.

If an agent or broker, meaning to appropriate the premium to himself, and take the chance of a safe arrival,

(*a*) Semb. *George* v. *Claggett*, 7 T. R. 359.

represent

represent to his employer that an insurance has been effected agreeably to his instructions, a practice but too prevalent, the principal may maintain trover for the policy against the agent or broker; and, upon proof of a loss, he shall recover to the same amount which he would have been entitled to recover against the underwriters, had a policy been effected.

Thus: An action of trover was brought against the defendants, who were brokers, for a policy of insurance; and it appeared on the trial, that they had written to the plaintiff, the master of the vessel, that they had got two policies effected; the one on account of his clothes and wages, the other on account of the owners; and that the underwriter was Mr. *Newnham.*—A loss having happened, the defendants produced a policy underwritten by one *J. S.*, upon the ship only, in which the plaintiff had no interest.—Lord *Mansfield*, who tried the cause, said;—"I shall consider the defendants as the actual insurers, and therefore the plaintiff must prove his interest and loss."—The defence set up was, that the letter to the plaintiff was written by the defendant's clerk through mistake: It was also contended that trover would not lie for that which never existed.—But his lordship would not suffer the defendants thus to contradict their own representation; and the plaintiff accordingly had a verdict to the amount of his interest, deducting the premium.

[illegible] v. *Car-* [illegible] at N.P. [illegible] Vac. 17[illegible]4.

A broker informs his employer that he has effected a policy for him; —In trover for the policy, the plaintiff shall prove his loss as in an action against the insurer; and the broker shall not be permitted to say that no such policy exists.

Sect. III.

Of the Form and Requisites of the Policy.

At what time the present form was introduced.

IT is very probable that the form of a policy of insurance nearly similar to that which we have now in use, was introduced into *England* by the *Lombards*, with their other commercial improvements (*a*). In the course of several centuries this form must have undergone some alteration.

(*a*) Vid. *Malyne lex merc.* 108.

alteration. But the fear of departing too far from the original must have suggested the clause inserted in every policy, that 'it shall be of as much force and effect as 'the surest writing or policy of assurance heretofore made 'in *Lombard-street*,' &c. And merchants, apprehensive of the danger attending every innovation in the forms of commercial contracts, have always been particularly tenacious of the form of this important instrument, though, in itself, extremely inaccurate, and unskilfully framed (*a*). But length of time, frequent discussion, and repeated decisions upon the construction of it, have reduced it to a considerable degree of certainty.

How construed. From the nature and object of this contract, courts of justice have always construed it according to the intention of the parties, and so as that the indemnity of the insured, and the advancement of trade, which are the great objects of insurance, may be attained. The *strictum jus*, or *apex juris*, is not to be laid hold of; but it is to be construed largely for the benefit of trade, and of the insured. The construction should also be according to the course of the trade in the place (*b*). But there are no rules of construction peculiarly applicable to this instrument: Such as apply to all other instruments equally apply to this, viz. that it is to be construed according to its sense and meaning; that the terms of it are to be understood in their plain, ordinary, and popular acceptation, unless, by the known usage of trade, they have acquired some peculiar and appropriate meaning, or unless the context evidently shews that they must, in the particular instance, and to effectuate the manifest intention of the parties, be understood in some other special and peculiar sense. The only difference between a policy of insurance and other instruments in this respect is, that the greater part of the printed language of it, being a general formula, adapted equally to all cases of marine insurances, has

(*a*) Mr. Justice *Buller* says, that it has always been considered in courts of law as an absurd and incoherent instrument. 4 T. R. 210.—(*b*) Per *Lee*, C. J. in *Tierney* v. *Etherington*, cited by Lord *Mansfield*, 1 *Bur.* 348.

acquired from use and practice a known and definite meaning; and that the parts which are filled up in manuscript, being in the terms selected by the parties for the expression of their own meaning, are entitled, where any doubt arises upon the construction of the whole, to have a greater effect ascribed to them than to the printed words.

The interpretation should be by the rules of the common law.

When a clause is clear in itself, it ought to be understood literally (*a*). But when clauses are obscure, the best and only mode of fixing their meaning is by the rules of the common law; because the parties must be presumed to make their agreements subject to that law.

Occasional clauses.

It is often necessary to introduce additional clauses into the policy, to adapt it to the particular stipulations of the parties, and it cannot but be matter of surprize to observe that these clauses, though sometimes of the utmost importance, are drawn up, not only without advice, but even without common attention to their import. Lord *Mansfield*, while observing upon the inaccuracy of one of these clauses, declared that he did not recollect an instance of an addition of this sort, which had not created doubts on the construction of it; and this frequently happened where a word or two, more or less, would have rendered the whole perfectly clear (*b*).

How occasional clauses should be construed.

In construing such occasional clauses it might not be improper to enquire by whom they were introduced; for if the party introducing them might have explained himself clearly and explicitly, his not doing so ought not to afford him an occasion to impose restrictions upon the other party, which he has not distinctly expressed (*c*).

The usual requisites of a policy.

The usual requisites of a policy are ten, which we will consider in their order.

(*a*) *Il n'est pas permis d'interpréter ce qui n'a pas besoin d'interpretation.* Vattel. liv. 2. ch. 17. n. 263.——(*b*) Doug. 257. ——(*c*) *Pactionem obscuram iis nocere, in quorum fuit potestate legem apertius conscribere.* Dig. l. 2. tit. 14. *de pactis leg* 39.—*Labeo scripsit obscuritatem pacti nocere potius debere venditori qui id dixerit, quam emptori; quia potuit re integrâ apertius dicere.* Dig. l. 18. tit. 1. *de cont. emp. leg.* 21.

1. *The Name of the Insured, his Agent or Trustee.*

In France the policy was underwritten in blank, and afterwards filled up.

In *France* it was usual, at the time *Emerigon* wrote, for the broker to produce the policy in blank to the underwriters, who signed it without seeing more than a short memorandum indorsed on it; and the broker afterwards filled it up at his leisure. It must be owned that there are sometimes critical moments which will admit of no delay: Nothing, however, but a case of such urgent necessity can justify so extraordinary a practice; and though several laws had been made to restrain it, it still continued to prevail, at least at *Marseilles* (*a*).

When the policy was filled up, it was necessary to insert the name of the insured, and whether he were agent or principal (*b*).

Policies in *England* were formerly in blank.

Remedied in 1774, as to insurances on lives.

With us it was formerly the practice to effect policies in blank, as to the name of the insured. This being found productive of many inconveniences, a regulation was adopted in *England*, in the year 1774, with respect to insurances upon lives (*c*), similar to some that had been introduced in some foreign countries, on the subject of marine insurances; and about the year 1785, it became a subject of complaint amongst underwriters that policies were so loose and indefinite, that they had no opportunity of knowing for whom the insurances were made, nor what was the nature of the things insured. They therefore desired to know at least the name of somebody concerned, no matter whether the principal or the agent; for though they might not know the principal, yet, if they knew the agent, they might have some confidence, that if he were a merchant, or other person of character, he would not be engaged in a dishonest transaction (*d*).

The 25 *G.* III. c. 44. required the name of the insurer, or his agent, to be inserted, if he resided in *Great Britain*; if not, the name of his agent.

These considerations induced the legislature to pass the stat. 25 *G.* III. c. 44. which, after reciting that certain

(*a*) *Emerig.* tom. 1. p. 47. Vid. 2 *Magens*, 65, 169.——(*b*) *Emerig.* tom. 1. p. 55.——(*c*) Stat. 14 *G.* III. c. 48.——(*d*) Vid. Mr. Justice *Buller*'s observations on the statutes, 25 and 28 *G.* III. 1 *Bos.* and *Pul.* 321 and 352.

mischiefs had resulted from the practice of effecting marine insurances in blank, directed 'That where the insured resided in *Great Britain*, his name, or that of his agent, should be inserted in the policy, as the person interested; and where he resided abroad, the name of his agent should be inserted.'

How this was construed.

Upon the construction of this act it was, soon after the passing of it, determined, that the agent's name must be inserted, *eo nomine* as agent; and that if the principal were abroad, the agent, in whose name the insurance was made, must be resident here (*a*); and it was likewise holden that the names of *all* the parties interested should be also inserted (*b*).

Repealed by the 28 *G.* III. c. 56. which enacts that the names or firm of the persons interested, or one of them, or of the consignor or consignee of the person who gives or receives the order to insure, shall be inserted.

This being found productive of greater inconveniences than those which the act was meant to remove, it was repealed by the stat. 28 *G.* III. c. 56. But it was still thought advisable to restrain the making of policies in blank; and therefore this last act provides, that 'No person shall effect any policy, on any ship or goods, without first inserting the name or names, or the usual stile and firm of dealing, of one or more of the persons interested; or of the consignor or consignors, consignee or consignees, of the property to be insured; or of the person or persons residing in *Great Britain* who shall receive the order for, and effect such policy; or of the person or persons who shall give the order to the agent or agents immediately employed to negociate or effect such policy; and every policy made contrary to the true intent and meaning of this act, shall be null and void.'

This act to be construed liberally.

Upon the construction of this act it has been determined, that it ought not to be taken in its strict literal sense, but ought to receive a liberal construction, according to its *true intent and meaning*. And therefore, if bills of exchange, drawn on the consignee of a cargo of goods,

(*a*) R. *Praye* v. *Edie*, 1 T. R. 313.——(*b*) Per *Buller*, J. in *Wilton* v. *Reaston*, at N. P. after Mich. 1787, *Park*, 17. In *Cox* v *Parry*, 1 T. R. 464. it was holden that executors could not recover on a policy, because the testator's name was not inserted in it.

for the amount of them, be ſent, together with bills of lading, by the conſignor to his general agent, with directions to deliver the bills of lading to the conſignee, on his accepting the bills of exchange; if the conſignee refuſe to receive the goods, or to accept the bills of exchange, the agent becomes in effect the conſignee, within the meaning of the ſtatute; and may inſure the goods as *agent for the conſignor*; or, *in his own right*, if he have accepted bills on the credit of the goods.

Wolf and others v. *Horncaſtle*, 1 *Boſ.* and *Pul.* 316.

A. having conſigneed goods to *B.* and drawn bills on him in favour of *C.* his general agent, ſends theſe bills, together with the bills of lading, to *C.* deſiring him to tranſmit them to *B.* that *B.* may inſure. *A.* alſo draws a bill on *C* for 300 l. which is accepted, and paid. *B.* refuſes to take the goods, or accept the bills drawn on him. *C* then inſures in his own name, and informs *A.* thereof, who approves what he has done.—*C.* may maintain an action on the policy, as agent of *A.* and aver the intereſt to be in him, *C.* being in effect conſignee, on *B.*'s refuſal to take the goods, and alſo having received, as well as given, the order to inſure. —*C.* may alſo declare in his own right, having an inſurable intereſt to the amount of 300l.

Thus:—An inſurance was made by the plaintiffs, 'as 'well in their own names, as for and in the name and 'names of all and every other perſon or perſons to whom 'the ſame did, might, or ſhould appertain, in part or in 'all, upon goods on board the ſhip *Fahrſunds Wharf*, at 'and from *Fahrſund* to *London*.'—The ſhip being loſt on the voyage inſured, an action was brought on this policy; and the firſt count in the declaration averred that the inſurance was made by the plaintiffs reſiding in *Great Britain*, as agents, and for the uſe of one *Jochum Brink Lund*, who was intereſted in the goods to the amount of the ſum inſured; and the ſecond count averred the intereſt to be in the plaintiffs, and that they made the inſurance on their own account. The defendant having tendered the premium, pleaded the tender. Upon the trial of the cauſe it appeared, that the plaintiffs were the general agents in *London* of one *Lund*, a merchant at *Fahrſund* in *Norway*, who having on the 12th of *November* 1796, ſhipped 574 ſacks of moſs at *Fahrſund*, conſigned to certain perſons in *London*, under the firm of the *Cudbear* company, and upon their account and riſk, tranſmitted to the plaintiffs the invoice and bill of lading, in a letter containing theſe words,—'Pleaſe to hand the incloſed to the '*Cudbear* company, that theſe friends may have an opportunity to ſecure themſelves by inſuring the moſs cargo, 'the ſeaſon being ſo far advanced.' On the 10th of *December* 1796, *Lund* drew a bill on the *Cudbear* company for 1112 l. 8 s. 2 d. the amount of the cargo, in favour of the plaintiffs, and ſent it to them to procure acceptance thereof, and place it to his credit; and, at the ſame time, adviſed the plaintiffs that he had drawn on them for 300 l. which bill they afterwards accepted and paid.

The

The *Cudbear* company received the bill of lading and invoice, and the bill for 1112 l. 8 s. 2 d. being presented to them for acceptance, they refused to accept it, or take the cargo, or insure it; and returned the bill of lading and invoice to the plaintiffs. The plaintiffs thereupon caused the above insurance to be made on the 9th of *January* 1797, without any order so to do; and the next day wrote to *Lund*, informing him what had been done. *Lund*, in his answer, approved of their having taken the precaution to insure the moss cargo, and informed them of the ship's having failed.—On this case it was contended on the part of the defendant, that the stat. 28 *G.* III. c. 56. (*a*), requires that the name of the person interested, or of the consignor, or consignee, or of the person who gives, or receives, the order to insure, should be inserted in the policy; none of which characters applied to the plaintiffs, who had received no order to insure, at the time the policy was effected; and the subsequent approbation of *Lund* could not be deemed equivalent to a previous order, and therefore the policy was void.—But the court determined that the policy was good within the meaning of the statute, and that the plaintiffs had an insurable interest.—Mr. Justice *Buller* (*b*) said,— "If the defendant can bring his case within the statute, he has a right to do so, and we are bound to give him judgment. But he has brought it neither within the words or meaning of the statute: And even if he had brought it within the words, and not within the meaning, I should be clearly of opinion, that we ought to decide against him, according to the directions of the statute, which in the last clause says, "Every policy of insurance made con-"trary to *the true intent and meaning* of this act, shall be "null and void." By putting the two acts 25 *G.* III. (*c*) and 28 *G.* III. together, we may learn the true spirit and meaning of the latter of these acts, which we are bound to say, must receive the most liberal construction that the words will bear. From the language of the two statutes, as well as the consideration that we are construing

(*a*) Sup. 307.——(*b*) Lord C. J. *Eyre* was absent.——(*c*) Sup. 306.

a contract *uberrimæ fidei*, viz. a policy of insurance, we must avoid being harder upon the plaintiffs than is absolutely necessary. Let us see whether the plaintiffs do, or do not, come within any of the descriptions of persons in the last statute. These descriptions are four; the *consignor* and *consignee*, the person *receiving*, and the person *giving*, the order. The plaintiffs are certainly not the consignors; but I am by no means clear that they are not the consignees. It is true that the goods were originally consigned to another person: But the case must be considered as it stood at different periods; and though the *Cudbear* company were clearly the consignees at first, it does not follow that they continued to be so. A consignee is a person to whom the goods are to be delivered when they arrive at the port of delivery. *Lund*, that he may be sure of being paid, and not chusing to trust the *Cudbear* company, sends the bill of lading, with a bill on them for acceptance to the plaintiffs, who are his general agents. If the *Cudbear* company had received the goods, they would have been the consignees; but they refused to receive them. Then who was entitled to receive them? It cannot be pretended, that nobody had the right. The captain could not keep them. Then, to whom could the right belong, but to the persons who had the bill of lading, and were the general agents of the consignor? From the moment, therefore, that the *Cudbear* company refused the goods, the plaintiffs became the consignees. If this be so, there is no objection to the policy, and I am satisfied I do not carry this construction too far, in favour of the justice of the case.—The next character mentioned in the statute, is *the person who receives the order* to make insurance. The goods were originally intended for the *Cudbear* company. But they were sent, accompanied by a letter, from which the plaintiffs must have seen that it was *Lund*'s intention to have them insured. It was his interest that they should be insured; and it is agreed, that a general agent has a right to exercise his discretion for the benefit of his principal. He must act on the spur of the occasion; and if nothing else had passed, I have doubts whether *Lund* would not have been liable to pay the premium. But his subsequent approbation brings

A general agent may insure without an order for that purpose, when it is for the interest of his correspondent that he should do so.

brings the case within the maxim, that *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.* I am clear, therefore, that the plaintiffs received the order to make this insurance, within the meaning of the act.—The last character mentioned in the act, is the *person giving the order* to make insurance. Now it is impossible to state a case that comes more directly within the act of parliament than this. Here the plaintiffs were the persons immediately concerned; they employed the broker, and gave the immediate order for the insurance, and consequently they come within the words of the act. The case, therefore, upon the first count, is clear of all objections, and is in law, conscience, and justice, in favour of the plaintiffs.—With respect to the second count, I hold that the plaintiffs had a clear right to insure to the amount of 300 l. for which they were interested in the goods. I agree that a debt which has no reference to the article insured, and which cannot make a *lien* on it, will not give an insurable interest. But a debt which arises in *consequence* of the article insured, and which would have given a *lien* on it, does give an insurable interest. The case is not at all altered by the circumstance of the goods not having arrived. There is no transaction more common in the city of *London*, than to raise money on the security of a bill of lading and policy. These plaintiffs, having advanced their money on that security, must, if the goods had arrived, have received 300 l. out of them. The goods being lost, the policy stands in place of them, and the plaintiffs are entitled to receive that sum under it. The chief justice, when this case was first moved, delivered a clear opinion in favour of the plaintiffs, and I think the case most decidedly with them."

A debt which would have given a *lien* on the thing insured, gives an insurable interest.

So, where an insurance was effected in the name of *Grandelos Mesle* and company, who were brokers, and also agents to *De Vignier* the plaintiff in several money transactions, and both resided in *London*. *Grandelos Mesle* and company were not described as agents in the policy, but in the declaration were stated to be "the persons residing in *Great Britain* who received the order for and "effected the insurance," and the interest was averred

De Vignier v. *Swanson*, 1 *Bos.* and *Pul.* 346. n.

If the name of the broker effecting the policy be inserted in it, it is a sufficient compliance with the 28 *G.* III. c. 56. though he be not described therein as agent.

to be in the plaintiff.—A verdict being found for the plaintiff, the defendant moved to set it aside and enter a nonsuit, on an objection to the form of the policy, as not sufficiently complying with the stat. 28 *G.* III. c. 56., because effected in the name of *Grandelos* and company, without stating them to be *agents*. But upon the case coming on to be heard, lord *Kenyon* said, he was surprized to find that the rule had been drawn up, as there was nothing in the case; and accordingly it was discharged without argument.

Bell v. *Gilson*, 1 *Bos.* and *Pul.* 345. sup. 86.

So, though it should appear that the agent named in the policy be not *general* agent, but only agent for that particular purpose.

The same objection was made, notwithstanding the two foregoing cases, in a case in which the policy described *Barret* and company, the brokers, in whose names it was effected, "as agents;" and a distinction was endeavoured to be made between this and the two foregoing cases, upon the ground, that in those, the person named in the policy, was the *general* agent of the party interested; whereas, in this case, *Barrett* and company were only agents for this purpose.—But the court overruled this objection, saying, that after the two foregoing decisions, one in the *King's Bench*, and the other in the *Common Pleas*, within the same term, upon the same point, this question ought to have remained at rest.

Vid. sup. ch. 5. s. 2.

2. *The Names of the Ship and of the Master.*

In every policy the ship must be named.

Every policy on a *ship* must necessarily identify the vessel which is meant to be insured, and this is done by merely naming the vessel and the master.—So, in almost all cases of insurance upon *goods*, it is usual and necessary to specify in the policy the ship in which they are to be transported: For, as ships are not all of equal strength and goodness, nor equally capable of performing any particular voyage, the insurer would be unable to form a just judgment of the risk, unless he were informed of the name and description of the vessel (a). This being inserted

(a) Quia non par est ratio assecurationis, quando merces devehuntur, in una navi, et quando in altera; imo solet id principaliter

inserted in the policy, it becomes a part of the contract that the adventure shall be on board the very ship specified, and no other; nor can any other vessel be substituted for it, unless through necessity, or with the consent of the insurer (*a*). Therefore, if the ship be not truly named, but the name of *another ship* inserted by mistake in its place, the policy will be void (*b*).

If three parcels of goods be insured on board three several ships, and all are put on board one; the policy will be good only as to the particular parcel destined for that ship.

Thus: If a merchant cause three several parcels of goods to be insured, each of the value of 1,000*l.*, one on board the *Neptune*, another on board the *Triton*, and the third on board the *Venus*; but he afterwards find it convenient to load all the three parcels on board the *Neptune*: In that case the underwriters would not be liable to the risk on all the goods to the amount of 3,000*l.*, but only on goods to the amount of 1,000*l.*, which, by the terms of the policy were to be laden on board the *Neptune*; and as to the remaining 2,000*l.*, the policy would never attach (*c*).

But a mistake in the name will not vitiate the policy, if the identity be proved.

But, to prevent the ill consequences that might result from a mistake in the name of the vessel or of the master, there are inserted in every policy these words; '*or by whatsoever other name or names the same ship or the master thereof is, or shall be, named or called.*' So that, if the identity of the ship can be proved, and no fraud be meant, a mistake in the name of the ship will not vitiate the contract. The rule is, *Error nominis navis non attenditur quando aliis conjecturis constat de identitate navis*; which is founded on the general principle, that *error nominis non nocet cum de re constat* (*d*). As where a ship insured was called the *Leopard* in the policy, but it appeared in evidence that her true name was the *Leonard*, it was objected that this was not the ship insured. But the identity being proved, it was holden that the above

Hall v. Molineux, coram *Lee*, C. J. at G. H. 7th *December* 1744. cited 6 *East* 385.

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ter considerari inter ipsos assecuratores, cum una navis sit magis fortis quam alia. *Roc.* h. t. n. 28. Vid. *Santerna*, h. t. p. 3. n. 313. *Stracca*, glos. 8. n. 10.—(*a*) The subject of changing the ship is fully treated, sup. c. 5. § 2.—(*b*) *Pothier*, h. t. n. 105.—(*c*) Vid. *Pothier*, h. t. n. 68.—(*d*) Vid. *Pothier*, h. t. n. 105.

words

words in the policy protected the insured from the effect of the variance (a).

Le Mesurier and another v. Vaughan, 6 East 382.

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So where the policy described the insurance to be 'on board the good ship called, *The American ship President*,' this was taken to be all *name*, and not a warranty of her being an *American* ship called the *President*. And the policy, as usual, containing the above clause, and the identity of the ship mentioned in the policy with that which contained the goods which were meant to be insured, being proved, it was holden to be no variance that the real name of the ship was the *President*.

In what cases goods may be insured, on board *ship or ships*.

Vid. sup. ch. 5. s. 3.

It often happens, however, that, in the trade carried on with distant countries, particularly in time of war, it is uncertain by what ships goods may be sent from thence to *Europe*. It is, therefore, of great importance to the merchant to be at liberty, in such cases, to avail himself of the first vessels that may offer for that purpose, and to make his insurance on the goods on board such vessels; and, in such case, the policy is upon the goods '*on any ship or ships*;' and this is now so well established, both by usage and authority, that the legality of it is indisputable.

The species of vessel must be truly described.

Not only the name, but also the species of vessel ought to be truly described; and if this be done falsely, in order mislead the insurer, and diminish the risk, as if a brig, a sloop, or other small vessel be described as a *ship*; this will vitiate the contract. For though the word *ship*, in its general signification, comprehends every different species of vessel, both great and small, which navigates the seas; yet, in a policy of insurance, the word ship is used in contradistinction to other vessels, and means a vessel with three masts, and generally of larger dimensions; and in such case an underwriter would have a right to say that he understood the policy to be on a *ship*, and that he would not have insured a sloop or brig. But if the error in the description of the vessel arise only from mistake or inadvertence, and it do not affect the risk; or if the insurers knew upon what vessel the risk

(a) Vid. *Pothier*, h. t. n. 105.

was

was to be run, the false description in the policy will not affect the contract (*a*).

Emerigon says, that if the insurance be made on a *privateer*, this should be mentioned in the policy: And even in the case of a *letter of marque* it is prudent, he says, to describe her as such. And he adds, that if this circumstance be not declared, and the ship be captured in pursuit of an enemy which she might have avoided, the insurers shall not answer for the loss (*b*).

If the ship be a privateer or a letter of marque, she should be described as such.

The name of the master, also, should be specified; because his character and ability are material subjects of consideration in estimating the risk (*c*). If the name of the master stood alone in the policy, without any clause to enable the insured to employ another in his place, it would be a part of the contract that he, and no other, should go for master; nor could any other be substituted in his place, unless in a case of necessity, or by consent of the insurer. To obviate the difficuties that must arise from this, the following words are always added in our policies, "*or whosoever else shall go for master in the said* "*ship* (*d*)."—But though this clause enables the owner to change the master when he sees occasion to do so; yet he ought not to do this wantonly or unnecessarily; much less ought he to name one, when he means to employ another; for this could only be done for the purpose of deceiving the underwriters, and would, of itself, be strong evidence of fraud.

The name of the master must likewise be specified.

But the owner may change the master.

But this ought not to be done unnecessarily.

3. *The subject Matter of the Insurance.*

The policy must likewise specify the subject matter of the insurance, whether it be goods, ships, freight, respondentia or bottomry securities, or other things.

(*a*) *Emerig*. tom 1. p. 164.——(*b*) *Emerig*. tom. 1. p. 161. ——(*c*) In *France* and *Holland* the insertion of the names of the ship and the master is enjoined by positive law. With us there is no such law. The whole rests on usage and the obvious necessity of inserting what it is so proper for the insurer to know.—— (*d*) The *French* express it, '*ou autre pour lui.*' This clause appears to be very ancient, and is found in the forms of the policies of most foreign countries. Vid. *Emerig*. tom. 1. p. 182.

If

It may be on goods and merchandizes generally.

If the insurance be on goods, it is not necessary to particularize the different sorts; it is usually expressed to be '*upon any kind of goods or merchandizes.*' In many cases it would be impossible to specify the different sorts of goods of which a cargo may consist; and this is the less necessary, because the memorandum inserted at the foot of every policy, protects the underwriter from any partial losses on those articles which are most perishable, and from small partial losses on all others (*a*).—Where the particular goods insured are meant to be specified, this is usually done at the foot of the policy; thus, '*On woollen cloth;*' sometimes on goods generally, with the mark of each bale, cask, &c.—It is not necessary that the goods should be specified in the policy; yet this is sometimes done for the satisfaction of the underwriters. And where they are specified, if they be not put on board, the policy will be void, although the insured have other goods of equal value on board. As if an insurance be made on goods by the name of *piece goods*; and, by the invoice, it appear that the goods shipped were *hats*, the insurer shall not be liable for any loss upon the hats (*b*). *Emerigon* lays down the same rule, and says that, if an insurance be made on a quantity of *tortoise shell* on board a certain ship; but instead of tortoise shell, a quantity of *indigo* be shipped for the insured, the insurer shall not be liable for any loss upon the indigo.—So, if an insurance be made on *oils and barilla*; this will not protect a cargo of *soap*, though these are the principal ingredients in soap. The species of a thing is ascertained by its substantial form.—That being changed, produces a new species and destroys the old. And yet an insuranne on ingots of gold has been holden to protect the metal converted into utensils or coin; because the substance is specifically the same, and may be converted into ingots again (*c*).

Or the goods may be specified.

If the goods specified be not put on board, the policy will be void, though the insured have other goods of equal value on board.

When the goods consist of but few articles, or are valued by the hogshead, pipe, bale, &c. they are generally specified.

When, indeed, a cargo consists of very few articles, it may be proper to specify them particularly. And where the goods are valued by the hogshead, pipe, bale,

(*a*) Vid. sup. c. 7. § 3.——(*b*) Per Sir J. *Mansfield*, Ch. J. in *Hunter* v. *Prinsep*, at G. H. 18th *July* 1806.——(*c*) Vid. *Emerig.* tom. 1. p. 299, 300, 301.

&c.

&c. it is of course to specify the commodity. But if an insurer subscribe a policy 'upon any kind of goods and 'merchandizes,' there can be no question but that he is bound by it, though no one article be specified (*a*).

Where an insurance is upon the ship and goods on board, without specifying them, and the ship touches at a port in the course of the voyage insured, and there lands goods and takes others on board, either in exchange for them, or purchased with the proceeds of them; the *French* writers lay it down that the goods so newly taken on board are substituted in the policy for those that were landed, become part of the subject matter of the insurance, and are protected by the policy to the extent of the sum insured, in like manner as the goods originally put on board (*b*). If goods insured generally be exchanged for others in the course of the voyage, the new goods become part of the subject matter of the insurance.

Respondentia and bottomry securities are a species of property which may be the subject of insurance, though they are in effect themselves a species of insurance. But then they must be particularly and specifically described in the policy; for, under the general denomination of *goods*, these securities cannot be insured. Respondentia and bottomry securities must be insured *eo nomine* as such.

Thus:—An insurance was made, 'on *goods and merchandizes*, on board a certain ship, at and from *Bengal* to '*London*.'—Before the signing of the policy, the plaintiff had lent captain *Tryon* 764 *l.* upon respondentia, upon goods of greater value belonging to him on board the ship, and for which he gave a respondentia bond in the common form. The ship and goods were consumed by fire and totally lost.—On this case, the question was, whether the plaintiff could recover the amount of the respondentia interest, upon this policy on *goods*.—On the part of the plaintiff was cited the stat. 19 G. II. c. 37. s. 5. (*c*) which provides, "that money lent on bottomry or respondentia, in the *East India* trade, shall be lent only on the ship or goods, and insured only by the *lender*; and that the borrower shall not recover on any insurance more than the value of his interest in the ship or goods, *exclusive* of the money

Glover v. *Black*, 3 *Bur.* 1394. 1 *Bl.* 399. 405. 422.

In an action on a policy on *goods*, the plaintiff cannot give in evidence a respondentia bond as a proof of interest in the goods which the obligor has on board.

(*a*) Vid. 1 *Mag.* 8.—(*b*) *Valin* sur art. 27. h. t. p. 78.; *Pothier* h. t. n. 63.; *Emerig.* t. 2. p. 38.—(*c*) Sup. 128.

money borrowed; and that, if this do not amount to the sum borrowed, he shall be responsible to the lender for so much as he has not laid out on the ship or goods, with interest, insurance, and all other charges." And it was argued from thence, that respondentia interest was insurable as goods, *eo nomine*, because the one is made the measure of the other; and the insurer always considers respondentia as goods, since he allows the bond itself to be the only proof of interest necessary, and never enquires after the value of the goods.—On the part of the defendant it was insisted, that the lender of money upon respondentia, had not, like a mortgagee, an interest in the goods of the borrower on board; for the property and possession both remained in the borrower; and therefore respondentia ought to be insured *nominatim*, and specifically; and that if an insurance on goods entitled the insured to recover on a respondentia interest, the insurer would be liable to be defrauded; for if the ship came home safe, the insured would be entitled to a return of premium, upon shewing, *that he had had no goods on board;* but in case of loss, he might claim, as he then did, upon his respondentia interest.—The court were unanimously of opinion, that a respondentia bond was not evidence of an insurable interest in the goods on which the money was lent.—Lord *Mansfield*, in delivering the judgment of the court, said: —"At the trial of this cause, and since, I have leaned as much as possible to support this insurance; because it appeared to have been made in this form, not through design, but merely by a slip, in not inserting the word respondentia. To be sure, the stat. 19 *G.* II. c. 37. s. 5. does not consider the owner of the goods as having a right to insure for more than the surplus value of the goods, above the money borrowed on respondentia. To many purposes the respondentia creditor has a *lien* on the goods: But we are satisfied that this act never meant to alter the manner or form of insurances; it only meant to prevent wagering policies. The act itself describes the insurance by the creditor to be on the *money lent*, and leaves it upon the practice. Now, in practice, bottomry and respondentia have always been considered as a particular species of insurance; and have taken a particular

cular denomination.* All the forms express the insurance to be on bottomry or respondentia: Nor is there a *dictum* that respondentia can be insured under the denomination of *goods*. It would be very dangerous, therefore, to establish a precedent to the contrary; since the consequence may be bad, and introductive of frauds, though we cannot now see the particular mode of them. The ground of our determination is, that, by the custom of merchants, respondentia is insured under a special denomination. But we by no means say, that under an insurance on goods at large, a man may not be permitted to give in evidence a mortgage or other special *lien*."

Yet the usage of a particular trade may sanction a departure from this rule.—As where the captain of an *East Indiaman* made an insurance on "*goods, specie, and effects* on board:' He was permitted to recover for money laid out for the use of the ship in the course of the voyage, and for which he charged *respondentia interest*: it being proved that this sort of interest was always insured in this manner in the *East India* trade.

Gregory v. Christie, B. R. Tr. 24 *G. III.* sup. 272.

An exception to this rule.

There are even certain articles, which, though they may be properly called goods, yet are not comprehended under the general denomination of goods, wares, and merchandizes in the policy; and therefore the insurer is not liable for any loss upon these articles, unless they be specifically named: Such are the master's clothes, and the ship's provisions, which are considered as a part of the furniture of the ship (*a*).—Neither are goods lashed to the deck comprehended under the name of goods, unless they be particularly described; because they are exposed to greater danger than goods usually are, and consequently the premium for insuring them is greater (*b*).

The master's clothes, the ship's provisions, and goods lashed to the deck, cannot be insured as goods.

Vid. sup. ch. 3 s. 5.

It has been questioned whether foreign coin, jewels, or bullion, could be insured under the general denomination of goods, wares, and merchandizes (*c*). It certainly appears from *Magen*'s collection of foreign ordinances (*d*)

Money, jewels, or bullion, may be insured under the denomination of goods.

(*a*) Vid. *Brough* v. *Whitmore*, 4 T. R. 206.—(*b*) R. *Ross* v. *Thwaites*, at N. P. *Park* 20. post. c. 16. §. 5.—(*c*) *Park*. 22. —(*d*) 2 *Magens*, 71. 89. 131. 187.

that

that in ſome places there are poſitive regulations which require that gold and ſilver, whether coined or uncoined, and jewels, ſhall be particularly ſpecified in the policy. In *France*, theſe articles may be inſured under the denomination of goods and merchandizes, provided the tranſport of them be not prohibited (*a*). And with us it is uſual to inſure them generally as merchandize; but it is not underſtood that the inſurer is liable for the riſk of a clandeſtine exportation (*b*).

But the inſurer is not liable for the riſk of a clandeſtine exportation of theſe articles.

Jewels, &c. worn by perſons on board, are not included in a policy on goods.

A diſtinction has generally been made between money, jewels, rings, trinkets, &c. which are a part of the *cargo*, as articles of commerce, and ſuch as are merely *perſonal*, and are not meant to be diſpoſed of as ſuch. The jewels and ornaments which are worn by perſons on board, and which are not conſidered as forming a part of the cargo, nor liable to contribute to a general average (*c*), would not be conſidered as included in a general policy on goods (*d*).

An inſurance on a ſhip does not cover the cargo on board.

An inſurance on a ſhip does not comprehend both ſhip and cargo: And therefore if a merchant inſure a ſhip generally, and ſhe then happen to be laden, the inſurer, in caſe of loſs, ſhall anſwer only for the ſhip, but not for the goods (*e*).

(*a*) *Emerig.* tom. 1. p. 297.——(*b*) 1 *Magens*, 10 Vid. *Da Coſta* v. *Frith*, 4 *Bur.* 1966. ſup. 108.——(*c*) Vid. inf. ch. 11. § 7——(*d*) *Aſſecurans merces in talem navem immiſſas, intelligitur aſſecurare pecuniam, aurum, argentum, gemmas, margaritas, et annulos, in dicta navi exiſtentes, quæ omnia, appellatione mercium, in navem immiſſarum, comprehendentur, licet expreſſa non fuiſſent.* Santerna *declarat quod ſi pecuniæ, margaritæ et annuli erant deſtinata ad vendendum, vel mercandum alias merces, tunc appellatione mercium veniunt, et in aſſecuratione comprehenduntur, et loco mercium habentur: Vocat dictas res merces, cum occaſione earum habeat locum contributio, ſicut aliarum rerum, ne in iſtis aſſecurationibus mercatorum potius appices juris quam veritas obſervari videantur: Et tandem, quia large comprehenduntur omnes res quæ ſunt deſtinatæ ad negotiandum et facit etiam quod confiſcatio mercium navis extenditur etiam ad pecuniam numeratam.* *Roccus*, not. 17.——(*e*) *Molloy*, b. 2. c. 7. § 18. *Roccus* n. 16.

4. *A Description of the Voyage, with the Commencement and End of the Risk.*

Every fact and circumstance relating to the contract of insurance must be stated with the most scrupulous regard to truth. The voyage insured must therefore be truly and accurately described in the policy; namely, the time and place at which the risk is to begin, the place of the ship's departure, the place of her destination, and the time when the risk shall end, whether on goods, or on the ship. If a blank be left for the place either of the ship's departure or destination, the policy will be void for the uncertainty.—As if a ship be insured from *London* to , this blank being left to prevent an enemy's learning the place of the ship's destination. If the ship in her voyage be cast away, the insured shall not recover his loss on this policy, though there were private instructions for the ship's port of destination (*a*).

The voyage, with the commencement and end of the risk must be precisely described.

If a blank be left either for the place of departure or of destination, the policy will be void.

In our ordinary policies, the continuance of the risk on *goods* is generally expressed to be "*from the loading thereof* "*on board the ship,*" and to continue "*until the same be dis-* "*charged and safely landed,*" at the port of delivery:—The duration of the risk in a policy on *freight* is the same as in a policy upon the goods for which the freight is to be paid.—Upon the *ship*, on an outward voyage, it is sometimes from *her beginning to load*, at some particular place, or *at and from* such place; sometimes *from a particular day*. On a homeward voyage, it is generally made to commence *on the ship's arrival* at a particular place abroad, or *at and from* such place; and it continues *till she arrives* at her place of destination, "*and is there moored 24 hours* "*in good safety.*"—Certain provisions are often added to enable the ship to touch, stay, trade, &c. at certain places out of the direct course of the voyage, without being guilty of a deviation.

How the commencement and end of the risk are usually specified.

When the insured intends a deviation from the direct or usual course of the voyage proposed, it is always pro-

(*a*) *Molloy*, b. 2. c. n. § 14.

 vided

vided for, and the policy adapted to it, unless fraud be intended. If this precaution be not taken, and the ship clear out for, or sail with instructions to touch at, any place out of the course of the voyage described in the policy, the contract will be void (*a*).

If the policy be made for a term, it must not exceed 12 months.

Sometimes privateers and vessels which are constantly employed in the coasting trade, are insured for a term. But, by the stat. 35 *G* III. c. 63. § 12. this term must not exceed 12 calendar months: If it exceed that time, the policy will be void.

The commencement and end of the term must be specified.

In policies for time, the commencement and end of the term should be distinctly specified. If, however, that should not be so precisely stated as it ought to be, it will be sufficient if it can be collected by construction from the policy, and the intention of the parties.

A liberty to cruise for six weeks, means six successive weeks.

Vid. sup. ch. 6. s. 2.

If a letter of marque be insured from *Liverpool* to *Antigua*, with liberty to cruise for six weeks; but no time is fixed for the commencement of the cruise: This is not to be understood as giving a power to cruise for six weeks at different periods, but only for one uninterrupted period of six successive weeks (*b*).

Though the description of the voyage be literally true; yet if it be calculated to induce a false conclusion, the policy will be void.

Even though the *termini* of the voyage insured be truly stated; yet, if the wording of the policy be calculated to induce in the insurer a belief that the *voyage* originally began at the port, where, by the policy, the *risk* is to begin, when in truth the ship had brought her cargo from another port; this will be a false description of the voyage, and the policy will be void.

Hodgson v. *Richardson*, 1 *Bl.* 463.

A ship takes in her cargo at *L.* and sails to *G.* An insurance is made on the goods from *G.* to *D.* '*to begin from the loading:*'—The policy is void; this being a false description calculated to induce a belief that *G.* was the port of loading.

As where goods were insured, 'At and from *Genoa* to '*Dublin*; the adventure to begin *from the loading to equip* '*for the voyage.*'—The cargo, consisting of pot-ash, verdigrease, and other perishable commodities, was put on board at *Leghorn* on the 10th of *August*, and the vessel losing her convoy, put into *Genoa* on the 13th of *August*, and lay there till the 5th of *January*, near five months, and then sailed. The insurance was effected on the 20th of *January*, at which time these circumstances were known

(*a*) Vid. sup. 184.——(*b*) R. *Syers* v. *Bridge*, *Doug.* 509. sup. 197.

to

to the insured, but not communicated to the underwriters. The ship in her voyage met with a storm, which considerably damaged her cargo, and an action was brought for a partial loss. On the trial it appeared that, by the usage, it was material to acquaint the underwriter, whether the insurance was to begin at the *commencement* or the middle of the voyage.—There was a verdict, however, for the plaintiff; but which was afterwards set aside, and a new trial granted; the court being clearly of opinion, that from the terms of the policy, it must be implied that *Genoa* was the *port of loading*, which was not true; and this being a misrepresentation (*a*) of a material circumstance, the underwriter had a right to say that this was not his contract.

So, if a ship and goods be insured, 'At and from the 'coast of *Brazil* to the *Cape of Good Hope*, beginning the 'adventure on the goods from the loading thereof *on the* '*coast of Brazil*, from the 17th of *September*, and upon 'the ship, *in the same manner*.' The goods were taken on board at the *Cape*, and the ship sailed with them to the coast of *Brazil*.—Upon this case the court determined that the policy never attached on the goods, because they were not loaded on the coast of *Brazil*; though they were the goods which the insured meant to insure, and were on board after the 17th of *September* on the coast of *Brazil*.—And that, inasmuch as the policy did not attach on the goods, it could not attach on the ship.

Robertson and another v. *French*, 4 *East*, 130.

Goods are insured from the loading at *A*. but those intended to be insured are taken in at *B*. and then carried to *A*.—The policy never attached.

S. P. *Grant* v. *Paxton*, sup. 260. 274.

If there be several ports of departure, and the insurance be from any one of them to the port of destination, the policy will not protect a voyage from one of those ports to another of them, undertaken before the ship's final departure to her port of destination.

If the insurance be from one of several ports of departure, it will not cover a voyage from one to another of them.

As where freight was insured, 'At and from *Demarara*, *Berbice*, and the *Windward* and *Leeward Islands*, 'to *London*.'—The ship, in *February* 1802, having discharged a cargo of slaves at *Demarara*, the master entered into a verbal agreement at that place, that she should take

Sellar v. *M'Vicar*, 1 New Rep. 23.

Freight is insured from *A. B.* and *C.* to *D.*—The ship at *A.* engages to take a cargo to *B.* and another cargo from *B.* to

(*a*) This is not so properly a misrepresentation, as a false description of the voyage insured.

 a cargo

D. Upon her departure from *A.* for *B.* she was by an accident disabled from carrying freight.—This was not a commencement of the voyage insured, and the policy never attached.

a cargo of bricks and planks from *Demarara* to *Berbice*, and another cargo from *Berbice* to *London*, for the usual freight for each voyage.—The ship having taken in her cargo from *Demarara* for *Berbice*, after breaking ground to proceed on her voyage thither, ran foul of another ship, and was so damaged that her cargo was taken out of her, and she was condemned and sold, and consequently earned no freight.—In an action on the policy it was objected on the part of the defendant, that the voyage insured was from *Demarara* to *London*, or from *Berbice* to *London*, or from any of the *Windward* or *Leeward Islands* to *London*, according to the place from which the ship might happen to take her final departure for *London*; but that, the ship never having sailed for *London*, the voyage insured had never commenced. —In answer to this it was insisted that, as the agreement was entire, the ship, as soon as she broke ground at *Demarara*, began to earn freight, and consequently, the policy attached; that the agreement had two distinct objects in view, and although the latter of these had failed, yet, as the former had commenced, there was an inception of the risk described in the policy, which might be considered as from *Demarara* to *London*, with liberty to take in a cargo at *Berbice*.—But the court determined that there was no commencement of the voyage insured, and that the policy never attached.

The port or ports of destination must be truly stated.

If the port or ports of the ship's destination be untruly set forth in the policy, the contract will be void. And this is not like the case of an intended deviation; for there can be no deviation from a voyage which was never in the contemplation of the party (*a*).

Wooldridge v. Boydell, Doug. 16.

A ship, insured from *A.* to *B.* appears by her papers to have had a different voyage in view, and is taken in the track to both places, before the dividing point.—This is not an intended deviation, but *a different voyage*, and the policy is void.

As where a ship was insured, 'At and from *Maryland* to *Cadiz*,' and was cleared from *Maryland* to *Falmouth*, and a bond given that certain enumerated goods should be landed in *Britain*, and all the other goods in the *British* dominions. An affidavit of the owner, and the bills of lading shewed that the ship was bound "to *Falmouth* and a market;" and there was no evidence that she was destined for *Cadiz*. She was taken in *Chesapeak Bay*, in the course from *Maryland* both to *Cadiz* and

(*a*) Vid. sup. ch. 6. § 2.

Falmouth,

Falmouth, before the dividing point. Many circumstances led to a suspicion, that she was in truth, designed for neither place, but for the port of *Boston*, to supply the *American* army; but there was not sufficient direct evidence of that fact.—The court determined that the plaintiff could not recover in this cause.—Lord *Mansfield* said;—"The policy, on the face of it, purports to be a voyage to *Cadiz*. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct course, it is always provided for, and the indemnification adapted to it. In all cases of deviation the *termini a quibus* and *ad quos* are certain and the same. Here the voyage was never intended for *Cadiz*."—Mr. Justice *Buller* said;—"There cannot be a deviation from a voyage which never existed. The weight of the evidence is, that the voyage was never designed for *Cadiz*."

If there be several ports of destination, the ship may go to one only.—If to more than one, then in their order.

But if there be several ports of destination specified in the policy, the ship may clear out and sail for one only of them. If, however, it be meant that she shall visit more than one of them, she must take them in the order in which they stand in the policy.

Marsden v. *Reid*, 3 *East* 572.

As where goods were insured 'from *Liverpool* to *Palermo*, '*Messina*, *Naples*, and *Legborn*, provided the *French* should 'not be at *Legborn*.'—Soon after the policy was effected, intelligence was received that *Legborn* was in the hands of the *French*; and the ship took in goods and cleared out for *Naples only*. In the course of the voyage, and before she arrived at the dividing point, she was captured in the *Bay of Biscay*.—It was objected that there was no inception of the voyage insured (*a*), which was to *Palermo*, *Messina*, and *Naples*, in the order in which they stand in the policy; whereas here it was never intended that the ship should go to *Palermo* or *Messina*, but only to *Naples*.—But it was determined that the underwriters were liable.—The court said that this was not a question of deviation, but merely, whether the ship sailed on the voyage described in the policy; that the voyage insured meant a voyage to all or any of the places named, subject, however, to this

(*a*) Vid. *Beatson* v. *Haworth*, 6 T. R. 531. sup. 189.

 restriction,

restriction, that if the ship should go to more than one of the places, she must visit them in the order in which they stand in the policy.

Murdock v. Potts, at N. P. after Trin. 1795.

Freight is insured from *A.* to *B.* but the goods, in truth, are intended to be sent to *C.*:—The policy is void.

So also, where an insurance was made on *freight*, 'At and from *Bourdeaux* to *Virginia*.'—It appeared in evidence, that the goods were, in fact, to be carried to *St. Domingo*, and that the ship was only to call at *Norfolk* in *Virginia* for orders:—Lord *Kenyon* was of opinion, that the underwriters must suppose that the goods were consigned to *Virginia*. But the freight payable, being for the carriage of them to *St. Domingo*, it was different from the freight insured; and though the ship was to call at *Virginia*, that did not alter the case. —The plaintiff was nonsuited, and no application was made to set the nonsuit aside.

Whatever may have been the original intention, if the ship in fact sail on a voyage different from the voyage described, the underwriters are discharged.

And whatever may be the *intention* of the insured at the time the insurance is effected, if, in fact, the ship sail on a voyage different from the voyage described in the policy, the underwriters are discharged; not, perhaps, on the ground of a wilful misrepresentation, but because the ship never sailed on the voyage insured, and there is no inception of the risk insured against.

Way v. Modigliani, 2 T. R. 30.

A ship is insured from a certain day, from *A.* to *B.* and before the day she sails on a different voyage, the policy is discharged.

Thus:—A ship was insured, 'At and from the '20th of *October* 1786, from any ports in *Newfoundland* 'to *Falmouth*, or her ports of discharge in *England*, with 'liberty to touch at *Ireland*, and any ports in the *Channel*.' —On the first of *October*, the ship left *Newfoundland*, went to the *Banks*, fished there till the 7th, sailed on that day from thence for *England*, and in that voyage was lost on the 30th of *November*.—In this case the question was, whether the policy ever attached, and whether it was not discharged, the ship never having sailed on the voyage insured.—On the part of the insured, it was contended, that though the risk of the *insured* began from the 7th, yet, as the risk of the *underwriters* was not to commence till the 20th, it could make no difference to them; and, in fact, their risk was considerably lessened, as the ship was part of her way home before the policy could attach.—But the court decided, that as the ship, instead of sailing for *England*, the voyage insured, sailed

to the Banks, which was a different voyage, the policy was discharged.

But though there be a *previous design* to touch at a port out of the usual course of the voyage insured, and the ship be even furnished with clearances for that port; yet, if the *termini* of the intended voyage be the same as those of the voyage mentioned in the policy, this shall not be considered as a different voyage, but only as an *intended deviation* (*a*).

If the *termini* of the voyage be the same, a previous design to touch at a place, is only deemed an intention to deviate.

But it is proper here to mention that, in the argument of this case, that of *Stott* v. *Vaughan* was mentioned, which was an action on a policy on the same ship, and for the same voyage, tried before Lord *Kenyon* at *Guildhall*, in Hil. Vac. 1794, in which his Lordship nonsuited the plaintiff, on the ground that the voyage intended was not the voyage described in the policy.

Stott v. *Vaughan*, at N. Pr. Hil. Vac. 1794.

But if, for particular reasons, a place be mentioned in the policy, where the ship shall have liberty to touch, when in fact it is not intended that she shall touch there, but proceed directly to her port of destination, this will not avoid the policy; for the insured may shorten the voyage, and diminish the risk (*b*).

If the ship have liberty to touch at a place where she is not to go, the policy will be good.

As where a ship was insured from *London* to *Nantz*, *with liberty to touch at* Ostend; and she cleared out for *Ostend* only, though it was designed that she should proceed immediately to *Nantz*, with bills of lading, purporting to be made out at *Ostend*, as if her cargo had been shipped there, in order to enable the shippers to import *English* goods into *Nantz*, at *Ostend* duties, and also to save the light-house duties going down the *Channel*.—This being a constant practice, and known to all concerned in this trade, it was held to be no fraud on the underwriters; and that the policy was good.

Planché v. *Fletcher*, *Doug.* 238.

If, from a certain point in the voyage insured, there be several tracks which lead to the place of destination,

If from a point in a voyage, there be several tracks, of which the captain usually elects which he will pursue; but a particular track is *prescribed* to *him* by the insured; this

(*a*) R. *Kewley* v. *Ryan*, 2 *H. Bl.* 343. sup. 174. 202—
(*b*) Vid. *Emerig*. tom. 2. p. 52.

should be mentioned in the policy, otherwise it will be void.

with certain advantages and disadvantages attending each; and, at that point, the captain has usually been at liberty to elect, according to circumstances, which of the courses he would take. If the ship insured sail, *with orders from the insured, to take one particular track*, in order to touch at a port in that track, this ought to be stated in the policy, otherwise it will be void; for the insurer is entitled to the advantage of the captain's judgment in electing, at the moment he arrives at the dividing point, which of the tracks it will be best for the ship to pursue, under the then existing circumstances.

Middlewood v. Blakes, 7 T. R. 162.

Thus:—The ship *Arethusa* was insured, 'At and from *London* to *Jamaica*.'—In an action upon this policy, for a loss by capture, the defendant paid the premium into court, and resisted the demand on the ground that the policy was void, as not containing a true description of the voyage intended.—On the trial, it appeared that the ship was cleared out for *Jamaica* only, but sailed *with directions* to the captain to touch at *Cape Nicola Mole* in *St Domingo*, in order to land some stores there, pursuant to a charter-party, and afterwards to proceed to *Jamaica*.—*St. Domingo* lies in the track to *Jamaica*, and consequently the course from *London* to *Cape Nicola Mole* and to *Jamaica* is, to a certain point, the same. From that point there are three tracks which a ship bound to *Jamaica* may take; one immediately to the southward of *St. Domingo*; another further south; and a third to the northward of that island. In this last, after the ship had passed the dividing point of the three several courses, but before she had reached the subdividing point of the continuing course to *Jamaica*, and that leading into the port of *Cape Nicola Mole*, she was captured. Of the three several tracks to *Jamaica*, from the dividing point, which the ship passed, it appeared that those to the southward of *St. Domingo* were the most usual, especially in time of peace, and were the safest navigation; that the other, to the northward, was the shortest, but more difficult, navigation, but was sometimes preferred in time of war, by those who were acquainted with it, more especially in this

war,

war, because great part of the island of *St. Domingo*, including *Cape Nicola Mole*, being in possession of the *British* forces, there was less risk to be apprehended from privateers. But which of the three courses was the most advantageous to be pursued, in any particular instance, depended upon circumstances, upon which it was proper for the captain to exercise his judgment at the time. It was not pretended that the captain had in fact exercised any such judgment, in selecting the course he had taken; it being evident that he had adopted it as the most direct and proper one to be taken for the purpose of going into *Cape Nicola Mole*, whither he was then bound.—Lord *Kenyon*, before whom the cause was tried, was of opinion that the defendant was discharged under these circumstances; because, at the time when the ship was captured, she was bound to a different place from that for which she was insured; and with a view to which, the captain, under compulsion of his orders, had taken this particular track, and was not left at liberty to exercise his judgment at the dividing point, for the benefit of all concerned, as the insurers had a right to insist upon.—The jury accordingly found a verdict for the defendant, being, as they stated, unanimously of opinion, "that the "*concealment* (*a*) of the intention to go to *St. Domingo* "vitiated the policy."—Upon a motion for a new trial, it was insisted on the part of the plaintiff, that where the *termini à quibus* and *ad quos* remain the same, an intended deviation shall not vitiate the policy, if the loss happen before the ship arrives at the dividing point.—The court, however, were unanimously of opinion, that the

(*a*) This cannot so properly be called a *concealment*, as a defective description of the voyage in the policy. A concealment is generally understood to mean the withholding of some information material for the insurer to know, but not necessary to be inserted in the policy. But the description of the voyage insured must always be contained in the policy: nor do I apprehend that any *vivâ voce* communication would supply a defect in that description.

plaintiff

plaintiff was not entitled to recover.—Lord *Kenyon* said, "I will not now enquire whether the cases cited were, or were not, properly decided; though, perhaps, if this were *res integra*, I might have entertained some doubts. It is sufficient that those cases have been decided, and if the opinion which I gave at the trial tended to shake their authority, I would abandon it: But it seems to me that our deciding in favour of this defendant will not disturb any of the authorities. At the trial six witnesses, who had gone many voyages to *Jamaica*, were examined on the part of the plaintiff, respecting the common course of the voyage, two of whom had never taken the northern passage, and the other four said that the southern was the most usual; and that, at all events, the captain ought to exercise his discretion in each particular case, whether he should take the one course or the other. When this policy was subscribed, it must be taken for granted that the defendant knew what was the common course of the trade, and expected that the most expedient course would be pursued by the captain, acting on the emergency of the occasion: But in fact that discretion of the captain was taken away in this instance, and on that I formed my opinion. That was a most important fact and ought to have been communicated to the underwriters." Mr. Justice *Ashurst* and Mr. Justice *Grose* concurred in these sentiments, both founding their opinions on the want of a full disclosure of the particular course the ship was to take, as being a circumstance that might have materially varied the risk.—Mr. Justice *Lawrence* said,—"When the motion for a new trial was made, I was inclined to think that this case fell within the authority of the several cases cited by the plaintiff's counsel; and that, as the ship was taken in the course of her voyage to *Jamaica*, without stopping at *St. Domingo*, the plaintiff was entitled to recover: But, in the course of this discussion, I have changed my opinion. The principle on which those cases have been determined is, that when the ship is taken before she comes to the dividing point, the underwriters run no additional risk by the captain's intention to deviate afterwards; and therefore it is to be considered as if no such intention had been formed. Now if, in this case,

case, the ship had been captured before she took the northern course, I should have thought that the plaintiff would have been entitled to recover; for, in that case, the ship would have run no additional risk: But here she sailed for *Jamaica*, having a charter-party to stop at *St. Domingo*; and when she came to the dividing point, which I consider, in this case, to be that where she began to take the northern course, the ship was subjected to a risk for which the underwriters did not make themselves responsible; for, at that moment, they were entitled to have the benefit of the captain's judgment, whether he would go to the north or to the south. If it had appeared that the captain had really exercised his judgment, and had taken the northern course, as, in his opinion, the best, at that time, without being influenced by the charter-party to go to *St. Domingo*, I should have thought that a new trial ought to be granted: But I understand that he took this course, not after exercising his judgment, but because he was bound to go to *Cape Nicola Mole*; and therefore, there is no ground for sending this case to a new trial, though the jury have decided for the plaintiff on another ground which, in my opinion, is not tenable (*a*).

(*a*) The ground on which the jury decided was, that the not disclosing to the underwriters the necessity of the ships going to *Cape Nicola Mole*, was a concealment which vitiated the policy (vid. sup. 329). That ground seems to be the principal foundation of the opinions delivered by the other three judges. And indeed it would seem that the voyage intended was not the voyage insured. Vid. sup. 184. where the difference between an *intended deviation*, and *a different voyage* is shewn. In this case the defendant paid the premium into court, which plainly shews that he, or those who conducted his defence, meant to resist the plaintiff's claim, on the ground that the contract was void *ab initio*; and not on that of a *deviation*, which only discharges the insurers from the time it takes place, but does not entitle the insured to a return of premium.

5. *The Perils insured against.*

The various perils against which the insured means to be protected, must be distinctly enumerated in the policy. These are generally expressed in a form of words which has been long in use; and being dictated by the anxiety which is natural to persons who have great objects at stake, have been so multiplied, and are now so comprehensive, that they would seem to afford full protection against every accident or misfortune that can possibly happen in the course of any voyage, and for which it is meant that the insurer shall be answerable.

There are certain losses which are not comprehended in the usual words of the policy.

Vid. supra, Ch. 7. s. 2.

There are, however, as we have already seen, certain losses for which it is never meant that the insurer shall be answerable, such losses being imputable to the owners of the ship, or to the master and mariners whom they employ, rather than to the perils of the sea. Such are injuries occasioned to goods by bad stowage, by being exposed to wet, by theft, and embezzlement of the master or mariners, &c.

The clause '*lost* '*or not lost*.'

In all our policies are inserted the words, '*lost or not lost*,' by which the insurer takes upon himself, not only the risk of future loss, but also the loss, if any, that may already have happened. It is said (*a*), that this clause is peculiar to *English* policies. But the same thing is expressed in the *French* policies by the words, "*sur* "*bonnes ou mauvaises nouvelles*" (*b*).

It is not peculiar to *English* policies.

This clause, it is probable, was originally inserted in policies, only in cases where there was reason to fear that a loss had already happened; and in such cases the insertion of it necessarily induced the payment of a higher premium. But it has long been inserted in every policy, as a matter of course. The reason assigned by *Roccus* why this clause is thought unnecessary, and therefore not inserted in the policies of some countries, is,

(*a*) *Park*, 25. 5 *Bur.* 2803.——(*b*) Vid. *Emerig.* tom. 2. p. 143. *Pothier*, h. t. n. 24.

that

that the fate of the voyage being unknown, will not prejudice the insurance (*a*).

Natural law would require that the subject matter of an insurance, like that of a sale, should exist at the time of the contract: But municipal law adds, that although the thing insured may possibly no longer exist, but that it had perished before the contract was made, yet unless the insured or his agents knew this, at the time the contract was made, the thing insured is, by a sort of fiction of law, founded on the good faith of the insured, supposed still to exist, so as to be a proper subject of insurance, and not to be considered as lost till intelligence of the loss arrives. Or, may not the insurance, in such case, be presumed to be made, as it were, *nunc pro tunc?* May it not be presumed to have had its existence while the subject matter of it was in being, and before the time when the risk commenced? Upon this ground, and from the necessity of the case, policies, with this clause, are deemed legal contracts, and not wagers; nor can they, when rightly understood, be adduced as a precedent to authorize wager insurances.

Policies with this clause are not deemed wagers.

Though this clause is not inserted in some of the foreign policies, yet it must, in many cases, as *Roccus* supposes, be necessarily implied in the contract, otherwise it would be impossible for the merchant to be insured against risks which are already run; and against which it is sometimes indispensably necessary, for his safety, that he should be insured. For it often happens, in the cases of *middle voyages* in distant parts of the world, and in homeward voyages, that the risk is wholly, or in part, run before any insurance can be effected.

It has been said, that insurances, *lost or not lost*, 'are 'certainly very hazardous;—and that the premium is 'great in proportion' (*b*).—Why an insurance here is more hazardous, only because it is made after the risk has been begun, or even ended, in a distant part of the world, is not

It does not make the contract more hazardous.

(*a*) *Roccus*, h. t. n. 175.——(*b*) *Park*, 25. vid. *Molloy*, b. 2. c. 7. s. 5.

very

very obvious. Fraud out of the caſe, it would ſeem that if there be any difference, inſtead of being the ground of an increaſe of premium, it is rather in favour of the inſurer, who may reaſonably be ſuppoſed to ſpeculate better upon the occurrences of the time paſt, even in diſtant parts of the world, than upon thoſe of the time to come. An underwriter would be better able, at leaſt in time of war, to eſtimate the riſk of a voyage from the coaſt of *Africa* to *Jamaica*, two months after it was begun, than two months before.

6. *The Powers of the inſured in caſe of Misfortune.*

It was formerly doubted whether the inſured could uſe his endeavours to recover the goods which had been loſt, or in preſerving ſuch as had been ſaved, without waving his right to abandon (*a*). To obviate this doubt, a clauſe was introduced into the policy to enable the inſured in caſe of any loſs or misfortune, to employ all neceſſary means for the defence, ſafeguard, and recovery of the goods or ſhip inſured, without prejudice to the inſurance, and at the charge of the inſurers, to which they bind themſelves to contribute in proportion to their reſpective ſubſcriptions.

7. *The Promiſe of the Inſurers, and their receipt for the Premium.*

The next clauſe in the policy is that by which the inſurers bind themſelves to the inſured for the true performance of their contract, and confeſs themſelves paid the conſideration or premium, by the inſured, after the rate ſpecified.—The premium is ſo called becauſe it is paid *primo*, or before the contract ſhall take effect (*b*).

The receipt for the premium is only to preclude the inſurers from objecting the want of conſideration.

It is true that, in practice, the premium is not always paid when the policy is underwritten. Inſurances, as

(*a*) *Caſaregis*, Diſc. 3. n. 14.——(*b*) *Pothier*, h. t. n. 81.

has

has been already observed, are generally effected by the intervention of brokers, and open accounts are usually kept between them and the underwriters, in which they make themselves debtors for all premiums. Indeed it is laid down by the *French* writers, that, by the usage of trade, the insurer is to look to the agent who is employed to effect the policy, for his premium (*a*).

Sometimes the credit is given to the insured himself. If there be no express agreement, it would seem that the agent or broker is *primâ facie* liable. Perhaps in such case an action would lie against either, unless the principal has paid the premium to the agent; in which case the writers on this subject are of opinion that the agent is alone responsible (*b*).—But, whichever is liable, the insurer may recover the premium, and *indebitus assumpsit* will lie for it (*c*), notwithstanding the formal acknowledgement of the receipt of it in the policy, which is not inserted there as conclusive evidence of the actual payment of the premium, but to preclude the necessity of proving it in case of loss.

Indebitatus assumpsit will lie for the premium, notwithstanding the receipt of the insurer.

The payment or non-payment of the premium, therefore, can have no effect upon the insurance. Every insurer may insist on being paid the premium before he subscribes the policy; but having once subscribed it, and given credit for the premium, no matter to whom, he shall not afterwards be at liberty, when a loss has happened, to object the want of consideration for his promise.

The non-payment of the premium cannot affect the validity of the contract.

There is no fixed rule to ascertain the rate of the premium in any case. This must always depend on the agreement of the parties; and therefore the premium, whatever it may be, is always reputed to be just and fair, if there be no fraud or surprize on either side. If the nature of the risk be fairly and fully declared by the insured, the insurer can never dispute the payment of a loss, on the ground of the smallness of the premium (*d*).

(*a*) *Valin*, art. 3. h. t. p. 32. *Pothier*, h. t. n. 98. *Emerig.* tom. 1. p. 149.——(*b*) Vid. *Savary*, liv. 3. c. 2. *Emerig.* tom. 1. p. 148.——(*c*) R. *Jackson* v. *Colegrave*, Carth. 338. ——(*d*) Vid. *Emerig.* tom. 1. p. 69.

8. The

8. *The common Memorandum.*

The common memorandum next follows, for the purpose of confining insurances to their only proper object, namely, an indemnity against real and important losses arising from the perils of the sea, and to obviate all subjects of litigation about trivial losses, and losses arising from the perishable quality of the goods insured. For this purpose, it is now, by this memorandum, constantly stipulated in all our policies, that in the case of certain enumerated articles, of a quality peculiarly perishable, the insurer shall not be answerable for any partial loss whatever; that, in the case of certain others, liable to partial injuries, but less difficult to be preserved at sea, he shall only be liable for partial losses above five *per cent.*; and that, as to all other goods, and also the ship and freight, he shall only be liable for partial losses above three *per cent.* But there is an exception in this memorandum of all losses, however small, of the nature of *general average*; or where the ship is stranded: But this last exception is only found in the policies of private underwriters (*a*).

9. *The Date and Subscription.*

Sum insured inserted.

The sum insured is generally placed in the subscription after the signature, in the underwriter's hand-writing, and in words at length, not in figures, which are easily altered or changed. But it is not indispensably necessary that the sum shall be specified in the policy: An insurer may bind himself to pay the value of the effects insured, or a given proportion of it, without fixing that value in the policy (*b*.) But this is not usual in practice.

Date.

A policy of insurance, like every other contract in writing, should have a date. There are few instruments to which the true date is more necessary. This date,

(*a*) Vid. sup. c. 7. s. 3: where the subject of this memorandum is fully considered.——(*b*) Vid. *Pothier*, h. t. n. 75. *Emerig.* tom. 1. p. 57.

 when

when compared with the dates of facts connected with the transaction, serves to discover whether there be reason to suspect any fraudulent concealment, at the time of any of the subscriptions to the policy.

The date is not inserted in the body of the policy; for, as each subscription to a policy makes a distinct contract, each underwriter sets down the day, month, and year of his own subscription.

Each underwriter puts his own date.

This practice is preferable to that which prevails in *France*, where the first underwriter puts a date after his signature, and the rest subscribe without adding any date; at length the notary or broker closes the policy with the date of the first subscription. This practice, as *Emerigon* justly observes, must afford frequent temptations to fraud; and he laments, that though great endeavours had been used to introduce the *English* practice, this had been without effect (*a*).

Practice in *France*.

10. *The Stamp.*

The last requisite of the policy is that it be duly stamped.—Upon the subject of the stamp duties imposed on this contract, it will be only necessary to insert here the substance of the stat. 35 *G.* 3. c. 63. and this will be done the more fully, because it contains many regulations with which it behoves every person concerned in the business of marine insurances to be well acquainted.

This act, which is declared not to extend to insurances on lives, or against losses by fire (*b*), repeals all former stamp duties on marine insurances (*c*), and imposes 'On 'every policy of insurance upon any ship, goods, or mer-'chandizes, or upon other property, the following du-'ties, viz.—Where the sum insured amounts to 100l. a 'duty of 2s. 6d. and so progressively for every sum of

§ 1. A stamp of 2s. 6d. for every 100l. and 2s. 6d. for every fractional part of 100l.

(*a*) Vid. *Emerig.* tom. 1. p. 47.——(*b*) Sect. 2.——(*c*) Sect. 24.

'100l. insured: And where the sum insured is less than '100l. the like duty of 2s. 6d.: And where it exceeds '100l. or any progressive sums of 100l. each, by a fractional part of 100l. a like duty of 2s. 6d. for every 'such fractional part: And where the premium *bonâ fide* 'paid, or contracted for, shall not exceed the rate of 10s. 'and the sum insured amounts to 100l. a duty of 1s. 3d. 'and so progressively for every 100l. and the fractional 'part of every 100l. insured (*a*).

Where the premium does not exceed 10s. *per cent.* only 1s. 3d. *per cent.*

§. 4. In such case, the stamp may be 2s. 6d. for every 200l.

'Provided that where the premium shall not exceed 10s. '*per cent.* and the sum insured amounts to 200l. or upwards, a stamp of 2s 6d. may be used for every 200l. 'insured, instead of stamps of 1s. 3d. for every 100l.'

§. 10. Where the sum insured on homeward voyages exceeds the interest of the insured by 1000l. and the stamp is 1s. 3d. *per cent.* or 500l. where it is 2s. 6d. the excess of duty may be allowed.

'Provided that where an insurance is made on goods 'on board a ship specifically named on a homeward 'voyage, and the sum insured is found to exceed the interest by 1000l. or upwards, where the duty is 1. 3d. '*per cent.* or 500l. where it is 2s. 6d. and upon oath 'of the true value of the interest, and on production 'of the policy within a month after landing the goods in '*Great Britain*, and on proof of the return of premium 'by the several underwriters, on account of such short 'interest, the commissioners may allow for the excess of 'duty, provided the policy be delivered to the commissioners to be cancelled, and the interest insured be not 'valued from the policy.'

§. 11. Every contract shall be deemed a policy which shews the premium, risk, sum insured, and names of insurers.

'And every contract for any such insurance shall be 'printed or written, and shall be deemed a *policy of insurance*, in which the premium, the risk insured against, 'the names of the underwriters, and the sums insured, 'shall be specified, in default whereof, every such insurance shall be void.'

§. 12. No policy to be for a longer term than 12 months.

'And no policy upon any ship, or share therein, shall 'be made for any certain term longer than 12 calendar 'months; and every policy for a longer term shall be 'void.'

(*a*) By 41 *G.* III. c. 10. § 1. all these duties are doubled. Vid. inf. 340.

'Provided

'Provided that any lawful alteration in the terms of 'the policy may be made after it has been underwritten, 'and that no additional ſtamp be required by reaſon of 'ſuch alteration; ſo that it be made before notice of the 'determination of the riſk originally inſured; that the 'original premium exceed 10s. *per cent.*; that the pro-'perty of the thing inſured remain the ſame; that the 'alteration ſhall not prolong the term inſured beyond 'the period allowed; and that no additional ſum ſhall be 'inſured by ſuch alteration.' §. 13. Any alteration may be made in the policy, before notice of the end of the riſk, if the premium exceed 10s. *per cent.*

'And no ſuch inſurance, made in *Great Britain*, ſhall be 'given in evidence, or ſhall be good or available in law, 'unleſs ſtamped with the ſtamp to denote the rate of 'duty, or ſome higher duty, contained in this act; and 'it ſhall not be lawful to ſtamp any policy, after the in-'ſurance ſhall be printed or written, under any pretence 'whatſoever.' §. 14. No inſurance ſhall be available in law, unleſs duly ſtamped,—and no policy to be ſtamped after written or printed.

'And every perſon who ſhall make or effect, or pro-'cure to be made or effected, any ſuch inſurance, or ſhall 'pay, or agree to pay, any premium thereon, or ſhall 'enter into any contract for ſuch inſurance, unleſs it be 'printed or written, being firſt duly ſtamped with the proper 'ſtamp, or one of higher value, ſhall forfeit 500l.; and 'all brokers, agents, &c. negotiating ſuch inſurance, or 'printing or writing any agreement for ſuch inſurance 'before the ſame be duly ſtamped, ſhall alſo forfeit 500l.' §. 15. Any perſon effecting an inſurance, or paying any premium, or contracting for an inſurance, unleſs duly ſtamped, ſhall forfeit 500l. Brokers negotiating ſuch inſurances to forfeit 500l.

'And it ſhall not be lawful for any broker, &c. negotiat-'ing ſuch inſurance, to charge for brokerage, &c. or for 'any premium paid thereon, unleſs the ſame be printed or 'written and duly ſtamped; and every ſum ſo paid ſhall 'be deemed to be paid without conſideration.' §. 16. And their brokerage.

'And any inſurer or underwriter, who ſhall receive 'any premium, or pay any loſs, upon ſuch inſurance, unleſs 'it be written or printed and duly ſtamped; or any perſon 'who ſhall be concerned in any fraudulent device to evade 'the duties impoſed by this act, ſhall forfeit for every 'offence 500l.' §. 17. Any perſon inſuring without a ſtamp, or concerned in any fraud to evade the ſtamp duties, to forfeit 500l.

'But it being cuſtomary for the *London Aſſurance*, and '*Royal Exchange Aſſurance* Companies to prepare a label, 'containing the heads of the inſurance propoſed, ſigned by §. 18. But the two inſurance companies may make agreements for inſurances on un-

 'the

ſtamped labels, provided the policies be made out in 3 days after.

'the inſured, from which the policies are afterwards made; 'and it would be inconvenient to require the policies in 'all caſes to be immediately made out, it is provided, 'that the officers of thoſe corporations ſhall not be ſubject 'to any of the above penalties for making any agreement to 'inſure by ſuch unſtamped label, provided the day on 'which it was made be truly expreſſed in words at length, 'and a policy be made out in purſuance of the agreement, 'and according to one of the forms annexed to this 'act (*a*), and duly executed and ſtamped within three 'office days from the date of the agreement.'

Further regulations.

This act alſo contains regulations for the providing paper, &c. at the public charge, and the diſtributing of ſtamped policies, where the ſum inſured is not under 10,000l.—and for ſtamping paper, &c. brought to the office;—for appointing an office in *London* near the *Royal Exchange*, for the diſtribution of policies properly ſtamped; directing the mode of taking bonds from perſons to whom policies are delivered on credit, and keeping proper accounts with them; with directions for granting new policies in lieu of policies damaged; or where, by miſtake, a wrong ſtamp has been uſed, or ſubſcriptions have not been obtained to the amount of the ſtamp, on producing another policy made out for the ſame riſk, provided it be brought to be cancelled in ten office days after the date of the ſubſcription, or (if on an outward voyage) after the ſhip has ſailed.

By the 41 G. III. c 10. these duties are doubled

By the ſtat. 41 *G.* III. c. 10. § 1. all the duties impoſed by the above act are doubled.

By 42 *G.* III. c. 99. where the premium does not exceed 20s. *per cent.* the duties ſhall be the ſame as are impoſed by the above acts; where it does not exceed 10s. *per cent.*

By ſtat. 42 *G.* III. c. 99. 'Where the premium ſhall 'not exceed the rate of 20s. *per cent.*, one-half of the duty 'of 2s. 6d. impoſed by the ſtat. 35 G. III. c. 63. and 'one-half of the additional duty of 2s. 6d. impoſed 'by the ſtat. 41 *G.* III. c. 10. ſhall ceaſe and deter-'mine; and there ſhall be payable upon every inſu-'rance, where the premium ſhall not exceed the rate 'of 20s. *per cent.* the like duties only, as are by thoſe two

(*a*) Vid. Appendix, No. I. II. III.

'acts imposed upon insurances where the premium shall 'not exceed the rate of 10s. *per cent.* on the sum in'sured.'—These duties seem to be inserted without variation in the schedule, which will be found in that extraordinary composition, the stat. 44 *G.* III. c. 98.

The evidence to prove who was the first underwriter to whom a representation was made, if in writing, ought to be stamped.

In the case of *Marsden* v. *Reid* (*a*), the court determined, that if a separate slip of paper, containing the names of the underwriters, in the order in which they had been applied to, and had agreed to underwrite the policy (which was different from that in which their names appeared on the policy), be produced to shew that the person who stands first in this list was the person to whom a representation was made; this cannot be received in evidence unless it be stamped, because it has the effect of shewing that the contract entered into was different from that which appeared on the face of the policy.—The report of this case does not, however, state what stamp this slip of paper required. It cannot be considered either as another policy, for it possesses none of the requisites of a policy; nor as a memorandum of an agreement; for it has no resemblance to an agreement. And the object of the act seems to be, to secure the payment of the duty, as thereby regulated, and no more.

A memorandum extending the time of sailing requires no new stamp.

A memorandum on the policy extending the time of sailing beyond that which was originally limited by the policy, being made before notice of the determination of the risk, does not require a new stamp; this being within the proviso contained in the 13th section of the stat. 35 *G.* III. c. 63.

Kensington v. *Inglis*, 8 *East*, 273.

Thus:—An insurance was made on the 5th of *February* 1800, from the *Havannah* to *Nassau* in *New Providence*, upon goods, and also 'upon *ship or ships sailing between* '*the 1st of October* 1799, *and the 1st of June* 1800 *inclu*'*sive*.' Afterwards, by a memorandum, written upon the policy on the 11th of *June* 1800, it was agreed to extend the time of sailing to the 1st of *August* 1800.

(*a*) 3 *East* 572. inf. ch. 10. § 1. Vid. *Rogers* v. *M'Carthy*, 3 *Esp.* Rep. 106.

—The ſhip ſailed on the 18th of *July* 1800, and was loſt. —It was objected that this memorandum ſo far varied the contract ſtated in the policy, as to require a new ſtamp, without which it could not be given in evidence.—But the court held that this memorandum required no new ſtamp, being within the proviſo of the 13th ſection of the act (*a*).

Hill v. *Patten*, 8 *East*, 373.

But a policy on "ſhip and out-fit" cannot, by conſent, be altered to "ſhip and goods" without a new ſtamp.

But where an inſurance was made in *September* 1804, on '*ſhip and out-fit*,' in a voyage upon the ſouthern whale fiſhery, out and home; and in *March* 1805, long after the ſailing of the ſhip, and after the riſk commenced, in conſequence of ſome miſunderſtanding as to the broker's inſtructions, the underwriters, upon application made to them by the inſured, agreed to alter the policy, by indorſing on it a memorandum in theſe words: 'It is 'hereby agreed that the intereſt on this policy ſhall be 'on *ſhip and goods*, inſtead of *ſhip and out-fit*, as origi-'nally declared.'—The ſhip was loſt, and, in an action on the policy, it was determined that the out-fit originally inſured, being eſſentially different from *goods*, to which the policy was by the memorandum made to apply, the caſe did not come within the above exception; and that therefore the policy, after the alteration, required a new ſtamp. For though that clauſe enables the parties to make any alteration in the *terms or conditions* of a policy, it requires that the *thing inſured* ſhall *remain* the property of the ſame perſon. But here the thing inſured could not *remain* the property of the ſame perſon, becauſe, by the memorandum, it was changed for ſomething elſe.—But the court held that it was not to be inferred from hence, that where there is a ſucceſſion of cargoes, on board the ſame ſhip, in the courſe of the ſame voyage, theſe may not be the ſubject matter of the ſame inſurance under the denomination of *goods*: For though the parts of which it conſiſts are not co-exiſting, but ſucceſſive, and in kind and quality wholly diſſimilar; yet the adventure continues the ſame, and the ſubject matter retains its original denomination of *goods*.

But ſucceſſive cargoes on board the ſame ſhip, in the ſame adventure, may be covered by the ſame policy.

(*a*) Sup. 339.

Sect.

Sect. IV.*

When a policy may be altered or corrected.

A policy is never altered but by consent of parties, or the authority of the court.

THOUGH a policy of insurance, not being under seal, is but a simple contract, yet, it is always looked upon as an instrument of great solemnity, being the only evidence of a contract of the utmost importance to the parties interested. The general form of the policy, which has been for many ages nearly the same, is never altered, but with the utmost caution, and upon very great consideration (*a*); and therefore, when once a policy has been filled up and underwritten, no alteration can be made in it, but by the consent of all parties, or by the authority of a court of equity, or perhaps a court of law; and then only in a case where something has, by mistake or fraud, been inserted or omitted, contrary to the manifest intention and the real agreement of the parties. And a very clear case of this sort must be made out by unquestionable testimony to warrant such alteration.

In a clear case, the court will direct the alteration.

But, the following cases will shew, that where such a case is made out, the court will direct the alteration to be made, even after a loss has happened.

Henkle v. *Roy. Ex. Ass.* 1 *Ves.* 317.

This may be done, even after a loss; but then it must clearly appear to have been contrary to the intent, and a proper case for the court to interpose.

An insurance was made on a ship, '*At* and from '*London* to *Ostend*, from thence to *Rotterdam*, and from 'thence to the *Canaries*; warranted an *Ostend* ship.'—The ship was taken. The insured brought his bill to have the policy rectified, according to the intention of the parties; by stating the voyage from *Ostend* only, and not from *London*.—The evidence in support of the plaintiff's case appearing to be contradictory, his bill was dismissed. Lord Chancellor *Hardwicke*, in delivering his opinion, said,—" No doubt but this court has jurisdiction to relieve, in respect to a plain mistake in contracts, if reduced into writing contrary to the intent of the parties. And though the plaintiff comes to do this in a very

(*b*) Vid. 1 *Skin.* 54.

harsh case; namely, upon a policy, after a loss has happened, to vary the contract so as to turn the loss on that insurer, who otherwise, it is admitted, cannot be charged; yet if the case be so strong as to require it, the court ought to do it. The *first* question is, whether it sufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement of the parties; and *secondly*, supposing it so, whether this be such a case, under the circumstances of it, and the nature of the trade, as that the court ought to interpose and relieve."

Motteux v. Lond. Assur. 1 *Atk.* 545.

Instructions were given to make the risk commence from the ship's *arrival* at *A.* and it was made from the ship's *departure* from *A*: A court of equity ordered it to be altered.

So, where a policy stated that the adventure was to commence from the *departure* of the ship *Eyles* from *Fort St. George* to *London*;—upon a bill filed by the insured it appeared that the owner had directed an insurance to be made, "to commence from the ship's *arrival* at *Fort St. George*;" that a label, agreeably to these instructions, had been entered in a book, and signed by the agent and two of the directors of the *London Assurance*, and that, by mistake, the policy was made out different from the label. The loss happened *after* the ship's arrival at *Fort St. George*.—Lord Chancellor *Hardwicke* determined that the label which contained the names of the ship and of the master, the premium, and a description of the voyage, was a memorandum of the agreement, in which the material parts of the policy were inserted; that though the policy was ambiguous, yet the label made it clear; and as it was only the mistake of the clerk, it ought to be rectified according to the label.

When an underwriter agrees to alter the policy in order to correct a mistake, he shall not afterwards object that he ought to have had an increase of premium.

Bates v. Grabham, *Salk.* 444.

An underwriter agrees to alter a policy: He shall not afterwards be permitted to object

Thus:—An agent had instructions to procure an insurance on goods on board the *Mary* galley, Captain *Hill*.—The agent carried the letter to one *Stubbs*, a broker, and he, by mistake, made the insurance on the ship *Mary*, Captain *Hazlewood*. The *Mary* galley was lost; and then *Stubbs* applied to the underwriters to con-

sent

ſent to alter the policy; to which they agreed, and the miſtake was rectified.—It was objected at the trial, that, on account of the alteration, the inſurers ſhould have had an increaſe of *premium*, the ſhip *Mary* being a ſtouter veſſel than the *Mary* galley; but, Lord C. J. *Holt* over-ruled this objection, and held that the miſtake might be ſet right, and that *Stubbs* was a good witneſs: And he cited a caſe which happened in the time of Lord C. J. *Pemberton*, where an inſurance was made from *Archangel* to the *Downs*, and from thence to *Leghorn*; but there was a parol agreement at the ſame time, that the policy ſhould not commence till the ſhip came to ſuch a place; and it was held the parol agreement ſhould avoid the writing.

that he ought to have had an increaſe of *premium*.

Even a parol agreement ſhall control the written policy.

Yet it is a general rule that the policy alone ſhall be concluſive evidence of the contract; and that no parol evidence ſhall be received to vary the terms of it. And it has been determined that a parol agreement, that the riſk ſhould begin at a place different from that ſpecified in the policy cannot be received in evidence (*a*).

(*a*) R. *Kaines* v. *Knightley*, *Skin.* 454. inf. ch. 16. § 5.

CHAP.

CHAP. IX.

Of Warranties.

HAVING, in the foregoing chapter, ſhewn the nature and properties of the common policy, we now proceed, according to the diſtribution of our ſubject, to treat of thoſe occaſional ſtipulations and agreements by which the general tenor of the contract, as expreſſed in the common policy, is varied, qualified, or regulated. Of theſe the moſt important are warranties, which we will now conſider under the following heads, viz.

I. *Of the Nature and different Kinds of Warranties; and the Effect of the Breach of a Warranty;*
II. *How an Expreſs Warranty ſhall be made;*
III. *Of the Warranty that the Ship was ſafe on a given Day;*
IV. *Of the Warranty that ſhe ſhall ſail by a given Day;*
V. *Of the Warranty that ſhe ſhall ſail with Convoy;*
VI. *Of the Warranty of Neutrality.*

Sect. I.

Of the Nature and different Kinds of Warranties; and the Effect of the Breach of a Warranty.

Warranty, what.

A warranty is a ſtipulation or agreement on the part of the inſured, in nature of a condition precedent.—It may be either *affirmative*, as where the inſured undertakes for the truth of ſome poſitive allegation; as, that the thing inſured is neutral property, that the ſhip is of ſuch a force, that ſhe ſailed, or was well, on ſuch a day, &c.; Or, it may be *promiſſory*; as, where the inſured undertakes to perform ſome executory ſtipulation; as that the

Affirmative and promiſſory.

ſhip

ship shall sail on or before a given day; that she shall depart with convoy; that she shall be manned with such a complement of men, &c.

Express or implied.

Warranties are either *express* or *implied*. An express warranty is a particular stipulation introduced into the written contract by the agreement of the parties; as that the thing insured is neutral property, that the ship shall sail by a given day, that she shall depart with convoy, &c. An implied warranty is that which necessarily results from the nature of the contract; as that the ship shall be seaworthy when she sails on the voyage insured; that she shall be navigated with reasonable skill and care, that the voyage is lawful, and shall be performed according to law, and in the usual course, and without wilful deviation, &c. We will confine ourselves in the present chapter to the subject of express warranties.

Construed according to its commercial import.

A warranty, like every other part of the contract, is to be construed according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words.

Hyde v. *Bruce*, B. R. Hil. 23 *G.* III. MS.

Thus:—There was a warranty that a ship should have 20 guns; and it appeared that she had, in truth, 22 guns, but only 25 men; which number is far short of the necessary complement for 20 guns. It was objected that this warranty implied a competent number of men to work 20 guns, in case the ship should be attacked.—But it was determined that the warranty did not include any thing not necessarily implied in it. Lord *Mansfield* said,—"If a warranty be meant to mislead, it is a fraud, as much as a false representation. In this case there is no ground to impute fraud, and therefore the plaintiff is entitled to recover."

How performed.

A warranty being in the nature of a condition precedent, and therefore to be performed by the insured before he can demand performance of the contract on the part of the insurer, it is quite immaterial for what purpose, or with what view, it is made; or whether the insured had any view at all in making it: But, being once inserted in the policy, it becomes a binding condition on the insured; and unless he can shew that it has been literally fulfilled, he can derive no benefit from the policy. The very meaning

meaning of a warranty is, to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed.

A breach of it avoids the contract *ab initio.*

The breach of a warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory, stipulation. In either case, the contract is void *ab initio*, the warranty being a condition precedent: And whether the thing warranted was material or not; whether the breach of it proceeded from fraud, negligence, misinformation, or any other cause, the consequence is the same. The warranty makes the contract hypothetical; that is, it shall be binding, *if* the warranty be complied with. With respect to the compliance with warranties, there is no latitude, no equity; the only question is, has the thing warranted taken place or not. If not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty (*a*).

De Hahn v. *Hartley*, 1 T. R. 343.

A ship is warranted to sail on her *outward voyage*, with 50 hands; but, in fact, she sails with only 46:— This avoids a policy on her *middle voyage*, though during that voyage she has 52 hands.

Thus;—In *June* 1779 a ship and cargo, were insured 'At and from *Africa* to her port or ports of discharge in 'the *West Indies*;' and in the margin of the policy was written this warranty;—"Sailed from *Liverpool* with 14 "six pounders, swivels, small-arms, and 50 hands or "upwards, copper-sheathed."—The ship had sailed from *Liverpool* in *October* 1778, having then only 46 hands on board, and arrived in *Beaumaris* in six hours after. She there took in six hands more, and, from that time till the capture, had 52 on board. It was found that in her voyage from *Liverpool* to *Beaumaris* she was equally safe as if she had had 50 hands on board.—The ship being captured, and the plaintiff, not knowing that she had sailed from *Liverpool* with only 46 hands on board, paid his subscription: But, on learning that fact, he brought an action against the insured to recover back the money thus paid in his own wrong.—It was contended on the part of the defendant, that this representation had no relation to the voyage insured, which was from

(*a*) Vid. *Hibbert* v. *Pigou*, inf.

Africa

Africa to the *West Indies*; but only a representation of the state of the ship at *Liverpool*, before she sailed from thence, and was antecedent to the voyage insured.—But the court determined that this was a warranty, and a condition that the ship had sailed from *Liverpool* with a certain number of men; and this not being true, the policy was void.—This judgment was afterwards affirmed in the *Exchequer Chamber*.

It is also immaterial to what cause the non-compliance is attributable: For if it be not in fact complied with, though, perhaps, for the best reasons, the policy is void. The condition has not been performed, or the contingency has not happened, on which the contract was made; and the underwriter has a right to say that there is no contract. Therefore, if a ship be warranted to sail on or before a given day, and she be prevented, by any accident, as the sudden want of repair, the appearance of an enemy, &c. from sailing till the next day; though it may be right, in such case, not to sail on the day, yet the warranty is not complied with, and there is an end of the policy (*a*).

To whatever cause the non-compliance is attributable, the contract is void.

Sect. II.

How an express Warranty shall be made.

AN express warranty, being of the nature of a condition precedent, our courts have holden that it must appear on the face of the policy, in order that there may be indisputable and unequivocal evidence of a stipulation, the non-compliance with which will have the effect of avoiding the contract. Instructions in writing for effecting the policy, therefore, unless inserted in the instrument itself, do not amount to a warranty (*b*).

It must appear on the face of the policy.

As, where a written paper of instructions, relating to the force of the ship, with these words, '12 *guns and* 20 *men*,' was wrapped up in the policy, when brought to the

Pawson v. *Barnevelt*, at N. P. *Doug.* 12, n.

(*a*) Per Lord *Mansfield* in *Bond* v. *Nutt*, *Cowp.* 606, 7. inf.

(*b*) Per Cur. in *Pawson* v. *Watson*, *Cowp.* 790. inf. c. 10. § 2.

under-

A paper wrapped up in the policy will not make a warranty.

underwriters to be subscribed; and evidence was offered to prove that a written memorandum inclosed in the policy, was always, among merchants, considered as a part of the policy.—Lord *Mansfield* held that, whether this was or was not a part of the policy, was a question of law, and therefore such evidence could not be received; and that a written paper, by being folded up in the policy, did not become a warranty.

Bize v. *Fletcher*, at N.P. *Doug.* 13.

Even a paper wafered to the policy will not make a warranty.

So where a slip of paper, describing the state of the ship, the particulars of the voyage, &c. was *wafered* to the policy, at the time of subscribing:—Even this, Lord *Mansfield* held not to be a warranty, or to be considered as a part of the policy, but only as a representation.

But it will be sufficient if it be written in the margin.

But though it is essential to a warranty, that it appear on the face of the policy itself; yet it need not be written in the body of the policy: If it be written in the margin, either in the usual way (*a*), or transversely (*b*), it will be a good warranty, it being a part of the written contract when signed.

Yet if a policy refer to printed proposals, they will be considered as a part of the policy, even though they make a condition precedent.

Yet, in the case of a policy against loss by fire, it has been holden that the printed proposals of the insurance company, requiring the insured, in case of loss, to procure a certificate from the minister, churchwardens, and other parishioners of the reality of the loss and the fairness of the claim, are to be considered as part of the policy; and that the procuring such a certificate is a condition precedent to the right of the insured to recover, and cannot be dispensed with, even though the minister and churchwardens wrongfully refuse to grant it (*c*).

Sect. III.

Of the Warranty that the Ship was safe on a given Day.

If the ship was safe at any part of the day specified, the warranty is complied with.

TO preclude all suspicion of concealment as to the state of the thing insured, the insured sometimes warrants that

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(*a*) R. *Bean* v. *Stupart*, *Doug.* 11.——(*b*) Per Lord *Mansfield* at N. P. in *Kenyon* v. *Berthon*, *Doug.* 12. n.——(*c*) R. *Routledge* v. *Burrell*, 1 *H. Bl.* 254. *Oldman* v. *Bewick*, 2 *H. Bl.* 577. n. *Wood* v. *Worsley*, 2 *H. Bl.* 574. 6 T. R. 701. inf. B. 4. ch. 5.

the ship or goods insured were safe on a given day. Upon the construction of this warranty, it has been holden that if the thing insured was safe at any part of the day specified, the warranty is complied with; even though it appear that a loss happened on the day, and before the policy was underwritten.

As where a policy was effected on goods, "*lost or not* "*lost;*"—and, at the foot of the policy these words were written, "*Warranted well this 9th day of December* 1784." —It appeared that the policy was underwritten between the hours of one and three in the afternoon of that day; that the ship was well at six o'clock in the morning; but was lost at eight o'clock the same morning.—The court held clearly that the warranty was sufficiently complied with, if the ship was well at any time that day; for though it is a matter of indifference whether the thing warranted be or be not material, yet it must be literally complied with, and being so complied with, that is sufficient; that there was good reason for inserting these words, because they protected the underwriter from any loss *before that day*, to which the words *lost or not lost* would otherwise have subjected him; and thus, too, the words *lost or not lost* have also their operation. *Blackhurst v. Cockell*, 3 T. R. 360.

Sect. IV.

Of the Warranty that the Ship would sail by a given day.

THE time of sailing in most voyages is so material, that, in many policies, there is a warranty to sail on or before a certain day. Independently of the effect which a difference of seasons may have upon the risk, and of the necessity there is that the voyage shall end in a reasonable time, it is of great importance to the insurer, where the policy is '*at and from*' a place, that there be a day fixed for the ship's departure, in order that the duration of the risk, *at* the place, may be ascertained.—This, like every other warranty, must be strictly performed; and the following decision will shew that nothing, not even a detention by the authority of government, will excuse the non-performance of it (*a*). When there is a warranty to sail by a given day, nothing will excuse the non-compliance with it.

(*a*) Vid. *Roccus*, n. 38.

A ship

Hore v. Whitmore, Cowp. 784.

Even an embargo by a *British* governor will not excuse it.

A ship was insured, 'At and from *Jamaica* to *London*, '*warranted to sail on or before the 26th of July* 1776.'—In an action on the policy, the declaration stated that the ship was ready to sail, and would have sailed, on the 25th of *July*, *if she had not been restrained by the order of the governor of Jamaica*, and detained beyond the day; that she afterwards sailed and was captured. There was a verdict for the plaintiff.—Upon a motion to set aside this verdict, and enter a nonsuit, it was contended on the part of the plaintiff that the embargo by which the ship was prevented from sailing on the day mentioned in the warranty, came expresly within the meaning of the usual clause against the detention of rulers and princes, and therefore excused the delay.—But the court determined that the loss could, in no respect, be connected with the embargo. That the warrantry was *positive and express*, that the ship should depart on or before the day appointed, and therefore must be complied with.

Observations on this case.

The detention, in this case, was one of the perils insured against; and for which, while it lasted, the insured might have abandoned. But instead of that, the ship sails after the day stipulated by the warranty, and being taken, the insured claims as for a loss by *capture*, and alledges the detention by way of excuse for the non-compliance with the warranty. The court, in deciding that, by reason of this non-compliance, the plaintiff could not recover for a loss by capture, in effect decided that an irresistible force, though one of the perils insured against, would not excuse the non-compliance with the warranty, so as to enable the insured to recover for a loss which happened after the day.

A warranty to sail *after* a certain day must be observed with the same strictness.

It may, in some cases, vary the risk materially, that the voyage should not be commenced till after a certain season be past. Sometimes, therefore, the warranty is to sail *after* a certain day, and, before another day; and the following case will shew, that this must be complied with as strictly as the warranty, to sail *on or before* a given day.

Vezian v. Grant, at N. P. East. 1779. *Park* 346.

Goods were insured on board a *French* ship, 'At and 'from *Martinico* to *Havre de Grace*, with liberty to touch 'at *Guadaloupe*, warranted to sail *after the 12th of January*,

 and

'and on or before the first of *August*, 1778.'—At the time the insurance was effected, it was not known whether the ship would load at *Martinico* or *Guadaloupe*, the insured having goods to come from both places, the policy was therefore intended to cover the risk from both or either.—The ship sailed from *Martinico* the 6th of *November* for *Guadaloupe*, where she took in her whole loading, without returning to *Martinico*, as she intended to have done had she not got a complete cargo at *Guadaloupe*.—From thence she sailed for *Havre de Grace* on the 26th of *June* 1778, and was captured on the 3d of *September*.—In an action to recover for this loss, it was objected by the defendant, that, according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of sailing was not complied with, the ship having sailed from *Martinico* *before* the 12th of *January* 1778, to wit, on the 6th of *November* 1777.—Mr. Justice *Buller*, who tried the cause, was of this opinion, and the jury, under his direction, found a verdict for the defendant.

A ship warranted to sail from *Martinico after* a certain day, sails for *Guadaloupe* before the day, intending to return to *Martinico*; but finding a full cargo at *Guadaloupe*, she proceeds on her voyage:—This is a breach of the warranty.

But if a ship, warranted to sail on or before a given day, sail before the day, from the port of loading in one of the *West India* islands, with all her cargo and clearances on board, to the usual place of rendezvous, at another part of the same island, merely for the sake of joining convoy: This is a compliance with the warranty, though the ship be detained at the place of rendezvous beyond the day. The reason is, that when a ship clears out from her port of loading, with a complete cargo, and has no other object in view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port. If, indeed, her cargo was not complete, at the time she sailed, it would not have been a commencement of the voyage. This will be found decided upon great consideration in the following case.

If the ship sail before the day, to join convoy, this shall be a compliance with the warranty, though the way to the place of rendezvous be out of the course of the voyage.

An insurance was made on a ship, lost or not lost; 'At and from *Jamaica* to *London*; *warranted to have sailed on or before the first of August* 1776.'—The ship was completely laden at *St. Anne's* in *Jamaica*, and sailed from thence on the 26th of *July* for *Bluefields*, in order to join the convoy there, that being the general rendezvous for

Bond v. *Nutt*, Cowp. 601.

A ship is warranted to sail from *Jamaica* to *London*, on or *before a given day*; and, before

the day she sails to *Bluefields*, to join convoy, and is there stopped by an embargo till after the day. Though *Bluefields* is out of her course, yet, as she went thither only for convoy, this is a sailing on her voyage before the 1st of *August*.

convoy on the *Jamaica* station, and where a convoy then lay expecting to sail for *England* every day: But the greater part of the way from *St. Anne's* to *Bluefields* is out of the course from thence to *England*. On the ship's arrival at *Bluefields*, she was stopped by an embargo laid on all vessels at *Jamaica*, and detained there till the 6th of *August*, when she sailed, and was afterwards taken.—Upon these facts the jury found a verdict for the defendant, under the direction of Lord *Mansfield*, who tried the cause.—Upon a motion for a new trial, two points were made for the defendant.—1st. That the departure from *St. Anne's* was not a departure from *Jamaica*. 2dly. That if it was, the going to *Bluefields*, though for the purpose of convoy only, was a deviation, being out of the course of the voyage.—Lord *Mansfield* at first seemed desirous to know whether there were any authorities to shew that going out of the course of the voyage *for the purpose of convoy only*, was no deviation, and desired that a search might be made for such authorities. None, however, were found. At length, after great consideration, the court were unanimously of opinion in favour of the plaintiff on both points. They held, that though *Bluefields* was out of the course from *St. Anne's* to *England*, yet, as the ship went there only to join convoy, this was a sailing before the 1st of *August*, and not a deviation.—Lord *Mansfield*, after acknowledging that his direction to the jury was wrong, said;—"The port from whence the ship was to be insured, was, if I may use the expression, *the whole island*. We are all satisfied that the voyage from *Jamaica* to *England* began from *St. Anne's*; that when the ship left that place, she had no view or object but to make the best of her way to *England*; that every other ship, under the same circumstances, looked upon the touching at *Bluefields* to be the safest course of navigation from *Jamaica* to *England*; and that any other would have been imprudent; that the ship sailed from *St. Anne's* for *England, by the way of Bluefields*, and not to *Bluefields* with [illegible] other view. If she had gone there for any [illegible] take in [illegible] or [illegible], or to wait for [illegible] then have been one [illegible]

If the ship had g[illegible]

As neither party knew from what part of the island the ship would sail, they used the words, "*At* and from *Jamaica*," which protected her in going from port to port till she sailed. It follows that the word *sailed* in the warranty must mean, sailed *on her homeward voyage.* The question, then, is, Had she, or had she not, sailed on or before the day? No matter what prevented her; if she had not sailed, though for the best reasons, the policy would have been void. The contingency would not have happened, and there would have been no contract between the parties. If she had been prevented by any accident till the 2d of *August*, as by a sudden want of repair, or the appearance of an enemy at the mouth of the port, the captain would have done very right not to sail;—but then there would have been an end of the policy. It is very different from the cases where a voyage has been begun; there the usage of the voyage may justify going a little out of the direct course to join convoy, which may be reasonable, and for the benefit of all parties. But still it does not vary the fact of sailing. Had the insurance been *at and from St. Anne's*, the going round the island to *Bluefields* would have been a deviation."(*a*).

If the voyage be begun, the usage may justify going out of the course to join convoy.

So, where an insurance was made, 'At and from *Guadaloupe*, to *Havre*, *warranted to sail on or before the 31st of December*;'—In an action on this policy, to recover for a loss by capture, it appeared that the ship took in her complete loading and provisions for *France*, and all her clearances and papers, at *Point à Pitre*, in *Guadaloupe*, and, on the 24th of *October*, sailed from thence to *Basseterre*, where there is no port, but only an open road. The governor detained her there till the 10th of *January*, when she sailed with a convoy, which had arrived some little time before; and after some days, being separated from the convoy, she was taken.—The captain, who was the only witness produced at the trial, swore that he and the other captains of ships at *Point à Pitre* bound to *Europe*

Thellusson v. *Fergusson*, *Doug.* 346.

A ship warranted to sail from *Guadaloupe* before the 31st *December*, sails on the 24th *October* to *Basseterre*, to join convoy and receive the orders of government. She is there detained by the governor till the 10th of *January*, and then sails with convoy.—The sailing to *Basseterre* on the 24th of *October* is a compliance with the warranty.

(*a*) Upon the second trial, the plaintiff had a verdict.—Vid. Lord *Mansfield's* observations on this case, in *Thellusson* v. *Staples*, *Doug.* 352. n.

 had

had notice from the governor, ſome days before ſhe failed from thence, that a convoy was expected at *Baſſeterre* on the 25th of *October*; that he had uſed extraordinary exertions to get ready, and though he was not able to ſail before the 24th, he was ſtill in hopes of being in time for the convoy. The laſt ſhip's paper he received at *Point à Pitre* was *le role d'équipage*, or muſter-roll, dated the 24th of *October*, which gave authority to the captain to employ the crew, conſiſting of 20 perſons, in his return to *Havre*; adding this condition; "*paſſant à la Baſſeterre pour y prendre les ordres du gouvernement.*" Under this was written, on the ſame paper, an account, dated the 30th of *October*, of ſome changes in the number of the crew; and under that, an entry by an officer of the marine, dated at *Baſſeterre*, the 2nd of *January*, ſtating that he had examined the perſons on the roll, conſiſting of 25, including the captain, —and granting the captain permiſſion to return to *Havre*. On another paper produced by the plaintiff, called *le congé*, dated the 16th of *October*, were written at the bottom theſe words; "*Vu de relache à la Baſſeterre pour y attendre un convoi pour France. Ce* 28 *Octobre* 1778." The captain ſwore he underſtood that the only reaſons for the condition inſerted in the muſter-roll, that he ſhould go to *Baſſeterre*, were, that the convoy was to be at that place, and that he might take ſuch diſpatches as were ready for *Europe*. He had not objected to it, becauſe, in the regular courſe of his voyage to *France* from *Point à Pitre*, he muſt have gone that way to avoid *Montſerrat*. If he had arrived in the day time, he would not have caſt anchor, but would have ſent his boat for the diſpatches; but having arrived at night, his ſhip had been detained contrary to his expectation.—On the part of the defendant, beſide the muſter-roll, and the entry under it, were read a proteſt made by the captain on his arrival at *Dover*, and a part of his depoſition in the proceedings in the admiralty. The words of the proteſt, relied on, were, 'Whereupon he '(the captain) waited upon the proper officer at *Point à* '*Pitre* for his muſter-roll, and was by him informed that 'it would not be granted, but on condition that he ſhould 'firſt ſail to *Baſſeterre* and *there wait* the directions of the 'General of the iſland.' In a ſubſequent part he ſtates

 that

that he ſent to the ſuperintendant, and to the general, to inform them, 'that the ſhip and cargo were inſured, upon 'condition that ſhe ſhould depart from the iſland of *Gua-* '*daloupe*, before the 31ſt of *December*; the terms of which 'inſurance it was eſſential to fulfil. Notwithſtanding 'which, he was refuſed permiſſion to depart, and was 'kept there till after the 31ſt of *December*.' The depoſition principally relied on was as follows: 'At the time the 'ſhip was firſt purſued and taken, ſhe was ſteering her 'courſe towards *Breſt*. Her courſe was not altered upon 'the appearance of the veſſel by which ſhe was taken. It 'was at all times, when the weather would permit, di- 'rected to *Breſt*, for which point ſhe was directed to ſail, 'although her deſtination was for *Havre*, by the ſhip's 'papers. She was not ſailing *beyond or* wide of *Havre*. 'She was then about 8 leagues weſt of *Uſhant*, and her 'courſe was not altered to any other port, but was 'obliged to be directed to *Breſt*, in conſequence of *the* '*orders he had received*, ſubſequent to the delay of the 'ſhip's papers—That all the ſhip's papers found on 'board were true and fair, and none of them falſe or 'colourable.'—At the trial the captain alſo ſwore that his father, who had formerly commanded the ſhip, at *Baſſeterre*, directed him to keep in the courſe to *Breſt*: *But this was done as the ſafeſt way, in time of war, of getting to* Havre, *which ſtill continued to be the place of the ſhip's deſtination*.—Upon this evidence the plaintiff obtained a verdict; and upon a motion for a new trial, two objections were made on the part of the defendant. 1ſt. That there had been no inception of the voyage on the 24th of *October*, nor till after the 31ſt of *December*, though it was admitted that a *bonâ fide* and complete inception of the voyage was ſufficient, even though the force of an embargo, or any other compulſion, ſhould oblige the ſhip immediately to ſtop, or put back (*a*).—2dly, That the ſhip never ſailed on the voyage inſured, viz. from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to

(*a*) So ruled in a former caſe between the ſame parties, and in a caſe of *Earle* v. *Harris*, *Doug*. 352, n. inf. 358.

Under an insurance '*at and from*' an island the ship is protected in going from port to port in the island.

Brest.—The court determined in favour of the plaintiff on both points. Lord *Mansfield* said,—"There is no contradiction between the parole evidence, and the protest and deposition. Under an insurance "*at and from*" such a place as *Guadaloupe* or *Jamaica*, the word, "*at*" comprises the whole island, and, under that word, the ship is protected in going from port to port round the coast of the island: But the question here is, whether the voyage was *bonâ fide* commenced, and stopped by accident. As to the condition about taking the orders of government, the ship could not sail from any part of the island without the governor's leave. But the captain, when he left *Point à Pitre*, expected to meet a convoy at *Basseterre*, and to proceed immediately, without interruption. A convoy had been published, and he certainly would have gone to *Basseterre*, at any rate, independent of the clause in the muster-roll. With regard to the second point, the voyage to *Brest* was, at most, but an intended deviation not carried into effect."—Mr. Justice *Buller* said, —"The case between the same parties, in 1777 is in point. There was no embargo then, nor in the present case when the ship sailed. Here there was a *bonâ fide* sailing; and the ship was completely ready in all respects."

Thellusson v. Staples, Doug. 354, n.

The same point determined on a second trial.

The other underwriters on this policy, being dissatisfied with this decision, another cause was brought to trial upon the same evidence.—The second point was abandoned; but upon the first, it was insisted that, "To constitute a sailing within the meaning of the warranty in this policy, the vessel, at the time of sailing from her port of loading, must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were possible."—Lord *Mansfield*, at the trial, remained of the same opinion as in the former case, and there was again a verdict for the plaintiff, to which the defendant and all the other underwriters submitted without further litigation.

Farl v. Harris, at N. P. Hil. Vac. 1780.— *Doug.* [illegible]2

If [illegible] [illegible] [illegible]

Lord *Mansfield*, in his charge to the jury in this last case, cited the case of *Farl v. Harris*, which he said was a still stronger one.—There, an embargo was actually published before the ship sailed, and the captain immediately

diately after crossing the bar, returned to make a protest, and sent his ship knowingly into the embargo: But he swore that he expected the embargo would be taken off, and that he should proceed immediately upon his voyage; and the jury believed him.

before the ship sails, and the captain put himself into it, this will excuse his not sailing by the day.

As to the question, what shall amount to a sailing, to satisfy this warranty; there can be no doubt that where a ship once breaks ground, and is fairly under sail *upon her voyage*, though she go ever so little a way, and afterwards put back from stress of weather, or apprehension of an enemy in sight; or if she be then put under an embargo, and detained beyond the time of sailing; this is still a *beginning* to sail, and the interruption does not alter the case, because the warranty is already complied with (*a*).

If a ship goes under sail before the day; this is a compliance though she be forced back, or detained by an embargo.

It is said, that in the case of an insurance, *at and from London*, warranted to depart on or before a given day, it has long been a question, what shall be a departure from the port of *London*; or rather what is the port of *London* (*b*). But if the above doctrine of Lord *Mansfield* be well founded, it seems to afford a ready answer to this question. The warranty does not require that the ship shall absolutely *leave* her port of departure; but only that she shall *get under weigh with intent to proceed on the voyage insured.*

What shall be a departure from the port of *London.*

Sect. V.

Of the Warranty to sail with Convoy.

ANOTHER species of warranty often inserted in policies in time of war, is *to sail, or to depart, with convoy.* This, like other warranties, must be strictly performed; and nothing will excuse the non-performance of it. If, therefore, a ship, warranted to depart with convoy, sail without convoy, the policy becomes void, *defectu conditionis*, whether this be imputable to any omission on the part of the insured, or the refusal of government to appoint a convoy. And in such case, the insurer shall not

This warranty must be strictly performed.

And if the ship sail without convoy, from whatever cause, the policy will be void.

(*a*) Per Lord *Mansfield*, at N. P. in *Thellusson* v. *Fergusson*, *Cowp*. 607.——(*b*) *Park*, 338.

be anſwerable, though the ſhip ſhould be loſt by the perils of the ſea; for in time of war, a ſhip without convoy will expoſe herſelf to every other peril, to avoid that of an enemy. The fear of one danger often drives us into greater; *Cum plus in metuendo mali ſit, quam in ipſo illo quod timetur.*

A ſhip is diſabled in her paſſage to the place of rendezvous, and the convoy fails without her.—Whether ſhe may ſail without convoy.

Emerigon puts the following caſe, in which he thinks the ſailing with convoy may be diſpenſed with.—A ſhip is inſured from *Marſeilles* to *Toulon*, there to join convoy, and proceed to *America*. In her paſſage to *Toulon* ſhe ſuffers conſiderable damage, and is obliged to undergo a repair there, which renders it impoſſible for her to avail herſelf of the convoy. This being a misfortune occaſioned by the perils of the ſea, he thinks that the ſhip, when repaired, may proceed without convoy, at the riſk of the inſurer (*a*).

There are five things eſſential to a ſailing with convoy, viz. *firſt*, it muſt be with the regular convoy appointed by government; *ſecondly*, it muſt be from the place of rendezvous appointed by government; *thirdly*, it muſt be a convoy for the voyage; *fourthly*, the ſhip inſured muſt have ſailing inſtructions; *fifthly*, ſhe muſt depart and continue with the convoy till the end of the voyage, unleſs ſeparated by neceſſity. We will conſider each of theſe ſubjects ſeparately.

1. *It muſt be with the regular convoy appointed by government.*

A convoy, what.

A convoy, within the meaning of this warranty, is a naval force, under the command of an officer appointed by government, for the protection of merchant ſhips and others, during the whole voyage, or ſuch part of it as is known to require ſuch protection.

How the officers and ſeamen of ſhips employed as convoy are puniſhable for miſbehaviour.

The importance of the duty which the officers and ſeamen, belonging to ſhips of war employed as convoy, have to execute, has induced the legiſlature to ſubject

(*a*) Vid. *Emerig.* tom. 1. p. 164.

them

them to a more than ordinary responsibility: For, by the articles of war, enacted by the stat. 22 *G*. II. c. 33. art. 17. 'The officers and seamen of all ships appointed 'for convoy and guard of all merchant ships, or of any 'other, shall diligently attend upon that charge, without 'delay, according to their instructious in that behalf; and 'whosoever shall be faulty therein, and shall not faith-'fully perform their duty, and defend the ships and goods 'in their convoy, without either diverting to other parts 'or occasions, or refusing or neglecting to fight in their 'defence, if they be assailed, or running away cowardly, 'and submitting the ships in their convoy to peril and 'hazard; or shall demand or exact any money or other 'reward from any merchant or master for convoying of 'any ships or vessels intrusted to their care, or shall mis-'use the masters or mariners thereof, shall be condemned 'to make such reparation of the damage to the merchants, 'owners, and others, as the court of admiralty shall ad-'judge; and also be punished criminally according to the 'quality of their offences, be it by pains of death or other 'punishment, according as shall be adjudged fit by the 'court martial.'

A warranty to sail with convoy, means such convoy as government shall appoint.

A warranty to sail with convoy, or with convoy *for the voyage*, which is the same thing, is understood to mean, with such a convoy as government thinks proper to appoint; and whether it consist of one convoy for the voyage, or several convoys taken at different stations, it is still unquestionably a convoy for the voyage (*a*).

Sailing with any other force than the convoy regularly appointed, will not satisfy the warranty.

It is not every single ship of war, which may happen to take merchant ships under her protection, that constitutes a convoy, within the meaning of the warranty, or the understanding of merchants. Nothing short of sailing with the convoy appointed by government for the voyage will satisfy the warranty. The reason is, that government must be supposed to be best acquainted with the plans and force of the enemy, and the strength necessary to repel their attempts.

(*a*) Per Lord *Mansfield*, in *Smith* v. *Readshaw*, at N. P. 1781, *Park*, 349.

Therefore,

A ship puts herself under the protection of a man of war, and joins the convoy after its departure: This is not a sailing with convoy.

Therefore, in a case which we shall have occasion to mention more particularly presently (*a*), where the ship insured arrived at the place of rendezvous before the time appointed for the convoy to sail; but finding the convoy gone, put herself under the protection of a man of war, which came there to join the squadron which composed the convoy, and under her protection joined the convoy, but without obtaining sailing instructions: This was determined not to be a departure with convoy within the meaning of the warranty.

2. *It must be from the place of rendezvous appointed by government.*

This is the meaning of the warranty: For though it be usually expressed in general terms *to depart*, or to *sail* with convoy; yet, as it would often be impracticable, sometimes inconvenient, and in many cases unnecessary, to appoint a convoy to sail from each particular port, there are certain places of rendezvous, appointed by government for general convenience, to each of which the merchant ships from the neighbouring ports may repair, by a given day, for convoy: And it is a sufficient compliance with the warranty if a ship depart with convoy from such place of rendezvous (*b*). This, like most other questions relating to insurance, is regulated by the general usage of trade.

Lethulier's case, *Salk.* 443.

In a voyage from *London* to the *East Indies*, it is sufficient to sail with convoy from the *Downs*.

Thus:—An insurance was made, 'from *London* to 'the *East Indies*, warranted *to depart with convoy.*' The declaration stated, that the ship proceeded to the *Downs*, and sailed on her voyage from thence with convoy, and was lost.—On demurrer to this declaration, it was objected that this departing with convoy from the *Downs* was not a departing with convoy within the meaning of the warranty: But the court held, that this warranty must be construed according to the usage of merchants; that is, that the ship should sail with convoy from such place

(*a*) *Hibbert* v. *Pigou*, inf.——(*b*) The same rule prevails in *France*, vid. *Emerig.* tom. 1. p. 166.

where a convoy for the voyage is to be had; as the *Downs*, &c.—Lord C. J. *Holt* differed in opinion from the other judges of the court: He said,—'We take notice of the laws of merchants that are general, not of those that are particular usages. It is no part of the law of merchants to take convoy in the *Downs*.'

One would not hastily question any opinion given by so great a judge as lord C. J. *Holt*; but the obvious answer to his objection is, that, to take convoy *at the usual place of rendezvous*, is part of the general law of merchants; and that the *Downs*, in this instance, is the usual place.

The ship is protected in her passage to the place of rendezvous.

The warranty being thus understood, it follows that the ship or goods insured are protected by the policy in their passage from the port of loading to the place of rendezvous appointed by government. And therefore, if the parties mean to vary from the common course, and to specify any particular place of joining convoy, this must be particularized in the policy.

Gordon v. *Morley*, at N. P. 2 *Str.* 1265.

A ship is insured from *London* to *Gibraltar*, and the convoy appointed at *Spithead*: The ship is protected thither by the policy.

Thus:—A ship was insured 'from *London* to *Gibraltar*, warranted to depart with convoy.'—There was a convoy appointed at *Spithead*, and the ship, having tried for convoy in the *Downs*, proceeded for *Spithead*, and was captured in her passage thither.—In an action on the policy, the insurers insisted that, this being the time of a *French* war, the ship should not have ventured through the *Channel*, but should have waited in the *Downs* for an *occasional* convoy: And many merchants and office keepers were examined for that purpose.—But Lord C. J. *Lee*, who tried the cause, held that the ship was to be considered as under the protection of the policy *to a place of general rendezvous*, according to the interpretation of this warranty in the foregoing case. And if the insurers meant to vary the insurance from what is commonly understood, they should have particularized her departure from the *Downs*. The jury under this direction found for the plaintiff (*a*).

(*a*) Vid. *Emerigon*, tom. I. p. 166. where the same principle is laid down.

3. *It*

3. *It must be a convoy for the Voyage.*

Convoy in general means a convoy for the voyage.

A warranty to sail with convoy generally, means a convoy *for the voyage*; and it is not necessary to add the words, '*for the voyage*,' in order to make it so. Neither will the adding of these words, in some instances, make the omission of them, in any case, the ground of a different construction. If, therefore, it be stipulated in a policy, that the underwriters shall return a part of the premium, if the ship sail with convoy and arrive; this, like a general warranty to sail with convoy, means a convoy for the voyage; and sailing with a convoy for only a part of the voyage, will not entitle the insured to the stipulated return of premium.

Where part of the premium is to be returned, if the ship sail with convoy and arrive; this means a convoy *for the voyage*.

Lilly v. Ewer, Doug. 72.

Part of the premium is agreed to be returned if the ship sail with convoy from *Gibraltar*, and arrive.—This means a sailing with convoy *for the voyage*; and a sailing with convoy for part of the voyage will not entitle the insured to the return of premium.

Thus:—The *Parker Galley* was insured, 'At and 'from *Venice* to the *Currant Islands*, and at and from 'thence to *London*;' at a premium of five guineas *per cent.* 'to return two *per cent. if the ship sailed with convoy* '*from* Gibraltar, and arrived.'—The ship touched at *Gibraltar* on her way home, and sailed from thence under convoy of a sloop of war; which, however, was only destined to go to a certain latitude, as far as *Cape Finisterre*, being ordered on the *Lisbon* station; and accordingly, the ship and convoy separated, and the ship arrived safe at *London*.—The insured brought an action for money had and received against one of the underwriters, for a return of the two *per cent.* and the only question was, whether, by the terms of the policy, the condition for the return of this two *per cent.* was, a departure from *Gibraltar*, with such convoy as could be met with, for whatever *part of the voyage* that might happen to be; or, a departure with convoy *for the voyage*.—At the trial, the plaintiff called witnesses to prove, that, for some years past, when a convoy *for the voyage*, or the *whole voyage*, was intended, those explanatory words had been added; and that, by this usage, the expressions, "sailing with convoy;" and, a sailing with convoy *for the voyage*," had acquired distinct technical meanings; "with convoy," merely, signifying whatever convoy the ship should depart with, whether for a greater or less part of the

the voyage. Several policies were alſo produced filled up by the ſame broker who had prepared the preſent, in which the words " for the voyage," or, " for *England*," were added. It was alſo proved, that at the time when the ſhip left *Gibraltar*, no other convoy was to be had. Witneſſes for the defendant ſwore, that they underſtood the words " *with convoy*," to mean, convoy *for the voyage*: And the broker ſaid, that, at the time this policy was ſigned, he underſtood, and apprehended it was ſo underſtood by all the parties, that the convoy was to be for the voyage; and that the return was ſuch as was uſual when that was meant.—There was a verdict for the plaintiff.—But the court, upon motion, ſet this verdict aſide, and granted a new trial, being of opinion, that the words, " to depart with convoy," mean with convoy *for the voyage*.—Lord *Mansfield*, who had tried the cauſe, ſaid,—" At the trial I was ſtrongly of opinion, that, on the words, the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy that might be deſigned to ſeparate from the ſhip in a minute or two. But I ſtill think that the evidence of an uſage, not inconſiſtent with the words of the policy, was properly received at the trial. However, the people in the city think the evidence of the plaintiff's witneſſes was founded on a miſtake. Certainly, critical niceties ought not to be encouraged in commercial concerns, and wherever you render additional words neceſſary, and multiply them, you multiply doubts and criticiſms. It may be hard, becauſe words have been added in ſome inſtances, to force a conſtruction in a particular caſe, by the omiſſion of them."—Upon the ſecond trial there was a verdict for the defendant.

Evidence of an uſage of trade not inconſiſtent with the terms of the policy, is admiſſible.

Yet, a warranty to ſail with convoy does not, in all caſes, mean a convoy which is to accompany the ſhip inſured the entire way from her port of departure to her port of deſtination. A convoy means ſuch convoy as government thinks fit to appoint as a ſufficient protection for ſhips going the voyage inſured; whether it be for the whole, or only a part of the voyage.

Yet, it does not always mean a convoy for the whole of the voyage; but only ſuch convoy as government ſhall appoint.

Thus: An inſurance was made on goods, ' At and ' from *London* to *St. Sebaſtian* in *Spain*, warranted to de- ' part

D'Eguino v. Bewick, 2 *H. Bl.* 551.

Goods are insured from *London* to *St. Sebastian*, and a convoy is appointed from *Spithead* to *Bilboa*:—A sailing with this is a compliance with the warranty.

'part with convoy *for the voyage*.'—No convoy was appointed directly to *St. Sebastian*, but the ship sailed from *Spithead* under a convoy of frigates, the commander of which had orders from the admiralty, to proceed to *Gibraltar*, with the trade bound 'to that place and *Bilboa*, 'and to detach the *Weazel* sloop of war with the latter, 'with orders to see them safe to *Bilboa*, and then return 'to *England* with such vessels as he should find at *Bilboa*.' At the proper time, the *Weazel* was detached by the *Commodore*, with the trade to *Bilboa* and *St. Sebastian*, with orders 'to see them safe *off Bilboa*, and to take 'any vessels bound from thence to *England*, under his convoy to *Spithead*.' The *Weazel* proceeded on this voyage, but soon after parted from the ships under his convoy, in chase of a strange ship, and did not afterwards join them. The ship arrived safe off *Bilboa*, which was in her course to *St. Sebastian*, but was taken in her way thither.—The underwriters objected that, the convoy being only to *Bilboa*, the warranty had not been complied with. That a convoy to *Bilboa* could no more be construed to be a convoy to *St. Sebastian*, than a convoy to the *Cape of Good Hope* would be a convoy to the *East Indies*.—But the court held clearly that this was a compliance with the warranty.—Mr. Justice *Buller* said, that this was not like the case of *Hibbert* v. *Pigou* (*a*); for there a convoy was appointed and actually sailed from *Jamaica* to *England*; that the owner of a ship, when he makes an insurance, cannot know the orders of the admiralty respecting convoys, but must take such convoy as is provided for him; that, as to the instance of a convoy to the *Cape of Good Hope*, if government thought that a sufficient protection to the *East India* trade, and the usage were for *East India* ships to sail with convoy only to the *Cape*, and to consider that as the *East India* convoy, and no other convoy were appointed to the *East Indies*, the warranty would be complied with; though if there were another convoy to the *East Indies* it would be otherwise.

(*a*) Inf.

So, if a ship sail with a convoy for a part of the voyage, with intent to take another convoy for the residue, being according to the usage of the particular trade; this is a compliance with the warranty.

Separate convoys for different parts of the voyage.

Thus:—An insurance was made on a ship from *Tortola* to *London*, "warranted to sail *with convoy for the voyage.*" —It appeared, that a frigate was sent by the commander at *St. Kitts* to *Tortola*, to bring up the ships from thence, with orders, if they got a certain way to the northward, to go straight for *England*. They sailed from *Tortola*, but the ship insured being a bad sailer, fell behind, lost the convoy, and bore away for *England*, but was captured on her passage.—There was evidence that she could not have made either *St. Kitts* or *Tortola* again, and that she did for the best in bearing away for *England*. On the other side it was in evidence that she might have kept up with the convoy, as the frigate never sailed above three knots an hour.—There was a verdict for the plaintiff. —Upon a motion for a new trial, the court held this to be a sufficient sailing with convoy within the meaning of the warranty.—Lord *Mansfield* said,—"The frigate was the convoy from *Tortola*. The warranty never specifies the *force* of the convoy, that being left to government. The policy is, that the ship shall sail from *Tortola* with convoy *for the voyage*. But the usage governs this agreement. The commander sends part of his force to bring them to meet him, and that is a convoy from *Tortola*. The sailing orders are from the commander of the convoy for *England*."

Manning v. Gist, B. R. E. 22 G. III.—MS

A ship sails with a frigate to the rendezvous, with directions in a certain case, to proceed on the voyage. She loses the convoy, and instead of proceeding to the rendezvous, bears away for her place of destination:—This is a sailing with convoy.

It is frequently stipulated, that a part of the premium shall be returned in case the ship shall sail *with convoy*, or with convoy *for the voyage*, and arrive (*a*); and upon the construction of this clause, it has been determined that if a ship sail with convoy for the general place of rendezvous, where convoy for the voyage would be found, this is a sailing with convoy, within the meaning of the policy.

A ship sailing with convoy to the general place of rendezvous, is a sailing with convoy for the voyage.

As where a ship was insured 'from *Oporto* to *Lynn*, 'with liberty to touch and stay at any ports or places on

Audley v. Duff, 2 *Bos* & *Pul.* 111. inf. ch. 15. s. 3

(*a*) Vid. inf. ch. 15. § 3.

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'the coast of *Portugal* to join convoy; at 12 guineas *per* '*cent.* to return 6l. if the ship should sail with convoy from 'the coast of *Portugal*, and arrive.'—The ship sailed under convoy from *Oporto* for *Lisbon*, where the whole trade bound for *England* were to rendezvous, in order to sail together from thence. The ships going from *Oporto* for *Lisbon*, being dispersed in a gale of wind, the ship insured ran for *England*, and arrived.—It was determined that this sailing with convoy from *Oporto* for *Lisbon*, to join the general convoy there, was a sailing with convoy from the coast of *Portugal*, so as to entitle the insured to the stipulated return of premium.

De Garray v. Claggett, at N.P. 1795. *Park*, 349.

A ship insured from *Cadiz* to *Amsterdam* takes a convoy to *England*, with intent to take another convoy to *Amsterdam*.—This being according to usage, is a compliance with the warranty.

So, where a ship, insured 'At and from *Cadiz* to '*Amsterdam*, warranted to depart with convoy for the 'voyage, sailed from *Cadiz* under a *British convoy*, and was lost before she reached the *Downs*, where it was alledged the ships were to have taken a fresh convoy for *Amsterdam*.—In an action on this policy, the underwriters insisted that the convoy should have been direct to *Amsterdam*. The insured, on the other hand, contended, that all convoy must be according to usage, and that, in many voyages, there is no such thing as a direct convoy; but the ships proceed by *relays* of convoy, from stage to stage.—Lord *Kenyon*, who tried the cause, was of this opinion, and held that the warranty had been complied with.

4. *The Ship insured must have sailing Instructions.*

Sailing instructions, what.

SAILING instructions are written or printed directions, delivered by the commanding officer of the convoy to the several masters of the ships under his care, by which they are enabled to understand and answer his signals, to know the place of rendezvous appointed for the fleet in case of dispersion by storm, or by an enemy, &c. Such, therefore is the utility and the necessity of these sailing instructions, that no vessel can have the full protection and benefit of convoy without them. Sailing instructions are, therefore, so essential to a sailing with convoy, that, in general, unless they be obtained, the

Essential to a sailing with convoy.

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ship cannot be said to have sailed with convoy; and the warranty, therefore, is not complied with. It is one thing to be under the *convoy* of a ship of war, and another thing to sail merely under her *auspices* (*a*).

Hibbert v. Pigou, B. R. East, 23 G. III. MS.—

A ship arrives at the place of rendezvous before the time appointed for the convoy to sail; but finding the convoy gone, puts herself under the protection of a man of war, and afterwards joins the convoy, but without getting sailing instructions: This is not a departing with convoy.

Thus:—An insurance was made on the *Arundel*, Captain *Mann*, 'At and from *Jamaica* to *London*, *warranted* '*to depart with convoy*.'—The ship sailed from *Morant* harbour to *Kingston*, where she met the *Glorieux*, Captain *Cadogan*, on her way to join Admiral *Graves* at *Bluefields*, who had been commanded by Lord *Rodney* to rendezvous there, in order to convoy the merchant ships, which were to sail from thence on the first of *August* to *Great Britain*. Captain *Mann* asked for sailing orders from Captain *Cadogan*, who said he had none, not having joined the admiral; but he was sure the admiral would not sail from *Bluefields* before the *Glorieux* joined him. If he should, he, Captain *Cadogan*, would give Captain *Mann* sailing orders, and take every care of the *Arundel*. They proceeded together, and arrived at *Bluefields* on the 28th of *July*; but found that Admiral *Graves* had sailed two days before. The *Glorieux* and *Arundel* then sailed from *Bluefields*; the former behaving in every respect *as a convoy*. On the 7th of *August* they joined the fleet off *Cape Antonio*. In *September*, the whole fleet was

(*a*) "*Autre chose est d'etre sous l'escorte d'un battiment du Roi, et autre chose est de naviguer simplement sous ses auspices.*" *Emerig.* tom. 1. p. 171. There is in *Park*, 4th Edition, p. 342. a case of *France* v. *Kirwin* at N. P. after Mich 38 G. III. in which it is stated that it was the object of the plaintiff to get a decision on the point, *how far sailing instructions were essential to a sailing with convoy*; and that Lord *Kenyon* expressed the strong inclination of his opinion to be, that they were essential; but he would not decide it, as the ship in question had never, in fact, joined; and upon that ground the plaintiff was nonsuited. —It is somewhat strange, that the plaintiff in that case should seek to obtain a decision upon a point that seems to have been already settled as a general proposition; but it is still more strange that the plaintiff should hope to get a point decided which in his case never could arise, since the ship insured had never joined the convoy at all.

dispersed in a storm, and the *Arundel*, with many others, lost.—Upon this evidence, Lord *Mansfield*, who tried the cause, was of opinion that the warranty had not been performed, and under his direction, the jury found for the defendant.—Upon a motion for a new trial, this opinion was confirmed by the court.—Lord *Mansfield* said, "There are hypothetical contracts, and conditional contracts. In the former, the contract depends on an event taking place. There is no latitude, no equity; the only question is, has that event happened? But conditional contracts admit of a more liberal construction. Now the only question upon this contract is, whether this ship departed with convoy. A great deal must be referred to the usage of merchants. The government appoints a convoy for the trade, and names a place of rendezvous. Then, by the usage of the trade, the voyage begins at *Kingston*; but the convoy only commences at *Bluefields*; and, by the same usage, the warranty does not require convoy to *Bluefields*. Amongst merchants, a convoy is understood to be, *a naval force, under the command of a person appointed by government for that purpose*. Admiral *Graves* is appointed to rendezvous with ten sail of the line at *Bluefields*, and from thence to convoy the trade to *Great Britain*. When they come to the place of rendezvous, they take sailing orders from the admiral, *which are essential to sailing with convoy*; as, by them, they know the signals, for what place they are to steer, in case of dispersion by storm, or any other cause. Admiral *Graves*, on the 26th of *July*, for reasons best known to himself, thinks he has got all the ships for which he ought to stay, and proceeds on his voyage. He leaves no order for the *Glorieux* to follow him to *Cape Antonio*; and though it is true that the Commander in chief may change the place of rendezvous, yet, in this case, it is not true, as was supposed in argument, that *Cape Antonio* was appointed. At the time of sailing from *Bluefields*, the *Glorieux* was no part of the convoy; for she did not come there till two days after the fleet was gone.—Mr. Justice *Buller* delivered his opinion nearly to the same effect, except that he did not think sailing orders *absolutely necessary*.—Mr. Justice *Willes*, was of opinion that,

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as the convoy had sailed two days before the proper time, and no *laches* were imputable to the *Admiral*; and as he thought that sailing orders were not essential to convoy, the warranty was sufficiently performed.(*a*).

Yet it would seem that sailing instructions are not so indispensably necessary, that in every case, and at all events, they must be obtained. Mr. Justice *Buller*, in the case of *Webb* v. *Thomson*, seems to have drawn the line with great precision.—The cause had been tried before Lord C. J. *Eyre*; and, upon a motion for a new trial, in his lordship's absence, Mr. Justice *Buller* said;—"Had not my lord C. J. *Eyre* declared that the verdict in this case was entirely to his satisfaction, I should not decide upon this application in the first instance. The case is here brought to a question of law. *In point of law, then, the general position is, that sailing instructions are necessary.* I have never decided this point myself; but it has often been decided. I do not say that there may not be cases in which they may be dispensed with. In *Hibbert* v. *Pigou*, my expression is,—'It is not necessary to say whether 'sailing orders are essential or not. As at present ad'vised, I do not say that they are absolutely necessary.' The case of *Victorin* v. *Cleeve* goes no further. If the ship insured be at the place of rendezvous within the time appointed for the sailing of the convoy, but, from any misfortune, from stress of weather or other circumstances, the master have been absolutely prevented from obtaining his sailing instructions, and he depart with the convoy; this shall be deemed a sailing with convoy. But then he must take the earliest opportunity to obtain his sailing instructions. Generally speaking, unless sailing instructions are obtained, the warranty is not complied with. The captain cannot answer signals; he does not know

Webb v. *Thomson*, 1 *Bos. & Pul.* 5.

There may be cases in which the want of sailing instructions may be excused.

(*a*) It is scarcely necessary to observe, that this opinion of Mr. Justice *Willes* is not founded upon any principle known in the law of insurance. It might be an apology for the captain's sailing as he did; and perhaps Admiral *Graves* might have been answerable for the loss occasioned by his leaving the place of rendezvous before the time appointed; but the warranty was not complied with; and nothing will excuse that non-compliance.

the place of rendezvous in a storm; he does not, in effect, put himself under the protection of the convoy, and therefore the underwriters are not benefited."—Mr. Justice *Heath* and Mr. Justice *Rooke* concurred in this opinion.

Victorin v. *Cleeve* at N. P. 2 *Str.* 1250.

In the following case, *stress of weather* was held to be a sufficient excuse for not obtaining sailing instructions.

A ship joins convoy, but, by *stress of weather*, is unable to get sailing instructions; yet this is a departing with convoy.

An insurance was made 'from *Gottenburgh* to *London*, 'with a warranty to depart with convoy from *Fleckery*.'—In *July* 1744, the ship sailed from *Gottenburgh* to *Fleckery*, where she waited two months for convoy. On the 21st of *September*, at nine in the morning, three men of war, with a large convoy, stood off *Fleckery*, and ordered the ships there to come out. The ship insured got out by twelve o'clock, and was one of the first. The convoy, having sailed gently on, was two leagues a-head. It was a hard gale, and by six in the afternoon, the ship came up with the fleet; but could not get to either of the men of war, for sailing orders, *on account of the gale of wind*. It was stormy all night, and at day-break the ship was in the midst of the fleet; but the weather was so bad, that no boat could be sent for sailing orders. A *French* privateer had sailed among them all night; and it being foggy the next day, attacked the ship, which kept a running fight till dark, which was renewed next morning, when she was taken.—It was insisted, that this ship was never under convoy; no ship being ever considered as being so, till she has received sailing orders; and if the weather would not permit the captain to get them, he should have gone back.—But lord Chief Justice *Lee*, who tried the cause, was of opinion, that as the captain had done every thing in his power to obtain sailing orders, it was a departing with convoy.—'These 'agreements,' said the Chief Justice, 'are never confined 'to precise words: As in the case of departing with 'convoy from *London*, when the place of rendezvous is 'at *Spithead*, a loss in going thither is within the policy.' So the plaintiff recovered.

Veedon v. *Wilmot*, at G. H. July 1744, *Park*, 341.

So, where the ship insured had departed from *London*, and, on her arrival in the *Downs*, found the convoy under sail. The captain sent one of his men on board

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for sailing orders, which were refused; but the commodore said, "*Keep on, and I will take care of you.*" The ship was stranded and lost that night; and the question was, whether she was ever under convoy, not having sailing orders—Lord C. J. *Lee* held that she was under convoy, and the plaintiff had a verdict.

If the convoy be under sail, and the captain apply for sailing instructions, which are refused; but he is ordered to keep on, and he will be taken care of; this is a sailing with convoy.

This case can only be supported upon the presumption that it was proved at the trial, that the ship was in the *Downs* before the time appointed for the convoy to sail; and that the captain had done all in his power to obtain sailing instructions. Had the plaintiff failed in either of these points, he would have been without excuse for the want of them. He is bound to be at the place of rendezvous before the time fixed for the sailing of the convoy; and indeed he ought to be there in time to procure his sailing instructions, when they are delivered out to the other ships.—He is bound also to use all due diligence to obtain sailing instructions, before the departure of the convoy; and if he lose any opportunity, when it is possible for him to obtain them, and depart without them, this will not be a sailing with convoy, though he keep under the protection of the convoy, and get his sailing instructions as soon after sailing as he can.

Anderson v. *Pitcher*, 2 *Bos.* & *Pul.* 104. 3 *Esp*, Rep. 124. S. C.

A ship comes to the place of rendezvous after the convoy is under weigh; but the captain does not come on board till some hours after. Had he been on board on her arrival, he might have got sailing instructions. He sails with the convoy, but is unable to get his sailing instructions till next day:—This is not a compliance with the warranty.

Thus:—An insurance was made on the ship *Golden Grove*, 'At and from *London*, to all or any of the *West India* 'Islands, *Jamaica* and *St. Domingo* excepted; with leave 'to go to the place of rendezvous to join convoy, and 'warranted to sail from thence with convoy for the voy'age.'—The ship being lost soon after she sailed from *Portsmouth*, the plaintiff, who was an underwriter upon the policy, paid 284l. 5s. to the defendant, the insured, on account of the loss; but afterwards, having reason to think that the ship never received her sailing instructions, and therefore could not have departed with convoy, he brought the present action, for money had and received, to recover back the sum which he had thus paid under a mistake and in his own wrong.—Upon the trial of the cause, it appeared that the ship arrived at *Spithead* about nine o'clock in the morning of the 15th of *November* 1795, under the care of the chief mate, the captain himself being on shore at *Portsmouth*. On the preceding day (the 14th), sailing

instructions were delivered at *Portsmouth* to all such ships as applied regularly for them, and the captain of the *Golden Grove*, previous to her arrival, made enquiry concerning sailing instructions, but found that they could be obtained till the ship was actually in sight. On the 15th of *November*, by day-light, the admiral commanding the convoy, got under weigh, but had not entirely quitted the roadstead until about four o'clock in the afternoon. When he got under sail, he left the *Trident* frigate to bring up such vessels as did not weigh anchor with him. About one o'clock on the same day the captain came on board the *Golden Grove*, and got under weigh, at which time the *Trident* had also got under weigh; and both the admiral's ship and the *Trident* had then proceeded so far, that it was clear the *Golden Grove* could not overtake the former soon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter. The next day, between ten and twelve o'clock in the forenoon, the captain of the *Golden Grove*, being then only a quarter of a mile from the admiral's ship, went on board her, and obtained sailing instructions. Soon afterwards the *Golden Grove* was lost, having been, from the time of her departure to that of the loss, under the protection of the convoy.—Lord *Eldon*, who tried the cause, told the jury, that although, under some circumstances, sailing instructions might be dispensed with, yet that this did not appear to be a case of that kind; that the *Golden Grove* did not appear to him to have departed from the place of rendezvous with convoy, since she had either not arrived time enough to obtain sailing instructions; or, if she had arrived time enough, her captain had not used the necessary endeavours to obtain them before he sailed.—The jury, under this direction, found a verdict for the plaintiff.—Upon a motion for a new trial, the court, after full consideration, were unanimously of opinion, that there was no principle of law which could be the foundation of a verdict for the defendant, and therefore the plaintiff was entitled to recover.—Lord *Eldon*, in delivering the opinion of the court, said,—"It appears to me that if the captain of the *Golden Grove* had been on board his ship at nine in the morning when

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ſhe arrived, he might have obtained ſailing inſtructions from the frigate before he left the place of rendezvous. In point of fact, however, the admiral was under weigh before the *Golden Grove* arrived, and the frigate was under weigh before the captain was on board. It is now too late to ſay that this warranty is not to be expounded with due regard to the uſage of trade. Perhaps it is to be lamented, that in policies of inſurance, the parties ſhould not be left to expreſs their own meaning by the terms of the inſtrument. This ſeems to have been the opinion of Lord C. J. *Holt* (*a*). It is true, indeed, that Lord *Mansfield* expreſſed himſelf thus: 'Wherever you render additional words neceſſary, and 'multiply them, you alſo multiply doubts and criticiſms.' Whether, however, it be not true that as much ſubtlety is raiſed by the application of uſage to the conſtruction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reaſonably queſtioned. If, therefore, the queſtion before us be ſtill undetermined, the inclination of my mind will be to adhere to the letter of the contract; and I feel the more diſpoſed to do ſo, ſince it appears moſt clearly, that no man of the higheſt experience can aſcertain, by any reference to uſage, what other interpretation ought to be adopted. It is clear, that ſailing inſtructions are not neceſſary in all caſes: But in general they are eſſential to departing with convoy; and I do not find any thing in the circumſtances of this caſe which can bring it within any of the exceptions. It is clear that a ſhip is not bound to obtain ſailing inſtructions at the place of rendezvous *at all events*: The commander of the convoy may refuſe them till the fleet is out at ſea. But if they can be obtained by due diligence, ſhe is bound to obtain them."

This warranty muſt be expounded with reference to the *uſage of trade.*

(*a*) Vid. ſup. 362. *Lethulier*'s caſe.

5. *The Ship must depart, and continue with the Convoy till the end of the Voyage, unless separated by necessity.*

If the ship neglect to get under weigh in time, it is a breach of the warranty.

If the ſhip, by negligence or delay in getting under weigh at the ſame time with the convoy, loſe the benefit of protection, though for ever ſo ſhort a time; this is not a departing with convoy, and the policy becomes void.

Taylor v. Woodneſs, at N. P. Hil. Vac. 4 G. III. Park, 349.

As where the commander of a convoy from *Spithead* made ſignals for ſailing to *St. Helens* overnight, and the next morning, from ſeven o'clock till twelve, made repeated ſignals to get under weigh; yet one of the convoy did not ſail till two hours after him; in conſequence of which ſhe was captured by a privateer. This being clearly a breach of the warranty, Lord *Mansfield* nonſuited the plaintiff.

The ſhip muſt not only depart with convoy, but alſo continue with it, unleſs ſeparated by neceſſity.

But by this warranty, the inſured undertakes not only to depart, or to ſail, with convoy, but alſo to do all in his power to continue with ſuch convoy during the voyage, or ſo much of it as is uſual and neceſſary, and not to ſeparate from it unleſs compelled by neceſſity. But if, after the ſhip has got under weigh, ſhe loſe the convoy, or even her proper *place* or *poſition* in it, and this be occaſioned by any unneceſſary delay, or by the negligence or miſcondruct of the maſter, the underwriters are diſcharged.

Waltham & anr. v. Thompſon, at G.H. after Eaſt. 1801 MS.

A ſhip gets under weigh with the convoy, but waits ſome time for the maſter to come on board, whereby ſhe loſes her poſition in the convoy:— The underwriters are diſcharged.

As where the ſhip *Atlas* was inſured, 'At and from '*London* to *Madeira*, warranted to ſail with *Eaſt or Weſt* '*India* convoy.'—The ſhip ſailed from *London* on the 16th of *November* 1800, to join convoy at *Portſmouth*, and arrived at *Stokes Bay* on the 20th. The maſter, in proper time, took ſailing inſtructions from the captain of the *Andromeda*, for *Weſt India* convoy. On the 7th of *December*, at ten o'clock in the morning, the convoy, conſiſting of about 300 ſail, got under weigh. The maſter of the *Atlas*, was then on ſhore at *Stokes Bay* waiting for a *Mediterranean* paſs, which he expected from *London* by the poſt, and the *Atlas* ſtood off and on wait-

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ing for him, while the fleet was ſtanding for the *Needles*. A boat was ſent aſhore for him; but returned with an anſwer that it would be time enough by and by. The pilot then dropped anchor, and the ſhip's company were ordered to dinner. At three o'clock the maſter came on board, and expreſſed ſome diſpleaſure at what had happened, declaring that he had not ſent the above meſſage. The ſhip was immediately got under weigh; but almoſt the whole of the fleet were then paſſing through the *Needles*, *hull down*, that is, with only their maſts and ſails viſible. Some, however, were obſerved to be aſtern of the *Atlas* after the maſter came on board, and after ſhe had got under weigh. She made all ſail to overtake the fleet, but night coming on, it was dark when ſhe arrived off *Yarmouth*, and paſſing three veſſels at anchor there, which the maſter took for part of the convoy, he likewiſe brought the *Atlas* to an anchor there, intending to ſail early the next morning. But in the morning he found that the three veſſels at anchor were no part of the convoy, and there being a ſtrong tide againſt him, and no wind, he was prevented from ſailing till twelve o'clock. The *Atlas* then ſtood after the convoy, crowding all ſail till the 10th of *December*, when ſhe was captured.—In an action on the policy, the underwriters paid the premium into court, deducting a guinea *per cent.* for the riſk at and from *London* to *Portſmouth* (*a*).—Upon this caſe, Lord *Kenyon*, in his addreſs to the jury, ſaid, —"If by the maſter's negligence the ſhip loſt the convoy, or was put in a worſe *poſition* than ſhe might have been in, the underwriters are diſcharged. It appears to me that he has not done what he ought. It is ſaid, that veſſels that were aſtern of the *Atlas* got through the *Needles* with the convoy: But that is no anſwer. The ſhip would not have been in the ſame poſition, if ſhe had not waited for the captain; and the poſition which this delay has put her in, has occaſioned the loſs. But for this delay, ſhe might have been in the fore rank inſtead of the

(*a*) Vid. *Stevenſon* v. *Snow*, inf. ch. 15. § 2. and the convoy act, 38 G. III. c. 76. § 4. inf. 380.

hind rank."—The jury, under this direction, found for the defendant.

But the ship is not bound to keep with the convoy, at all events, the whole voyage.

All, however, that the warranty requires, and all that the insured can absolutely undertake to do, is, never to separate from the convoy, unless compelled by necessity. No man would enter into a warranty to keep with the convoy at all events, during the whole of the voyage, so as that both ship and convoy shall arrive together; because that is often, through stress of weather, and other causes, rendered impossible: And, though convoy for the voyage be clearly intended by the usual warranty, yet, an unavoidable separation is an accident to which the ship is liable, and the insurer still continues responsible for any loss that may happen during such separation.

Jeffery v. Legendra, 3 *Lev.* 320. S C. *Carth.* 216. 2 *Salk.* 443. 1 *Show.* 320. 4 *Mod.* 58.

A ship sails with convoy, and is separated by stress of weather, but does all in her power to rejoin the convoy:—This will not discharge the insurers.

Thus:—A ship was insured, 'from *London* to *Naples*, warranted *to depart with convoy.*'—The ship did depart from the port of *London*, in company with the convoy, but two days after was separated by a storm. The convoy put into *Torbay*, and the ship insured into *Fowey* in *Cornwall.* Three days afterwards, the wind setting right to bring the convoy down the *Channel*, the ship sailed from *Fowey* to meet the convoy; but it did not come, and the ship meeting with another storm, was driven on the *French coast*, and there taken.—Upon this case it was decided that the insured was entitled to recover, there being no neglect or default in the master of the ship; and that, having departed with convoy, and done all in his power to keep company with it, this answers the words of the policy.—That the meaning of the warranty, to depart with convoy, is, that the ship shall keep company with the convoy during the whole voyage, if possible; and, therefore, if the master be guilty of any fraud or negligence after his departure, notwithstanding he *departed* with the convoy, this is a breach of the warranty, and the policy is discharged.

But if the master, through fraud or negligence, leave his convoy, it is a breach of the warranty.

If a ship, separated from the convoy, neglect to rejoin it, the insurers are discharged.

If a ship be separated from the convoy by stress of weather or any other cause, she ought to use every endeavour to rejoin it as soon as she is able; but if she neglect to do so, the insurers will be discharged.

Before we conclude this branch of the subject, it will be

proper

proper to mention the regulations which have been made by a late act of parliament on the subject of convoy.

The avidity of gain which usually accompanies commercial adventure, having often tempted our merchants to risk their ships and goods at sea, in time of war, without the protection of convey, and which they were enabled to do at the expence of an additional premium to cover the additional risk, the wisdom of government perceived the impolicy of suffering the continuance of a practice, as injurious to our commerce as it was beneficial to the enemy; and therefore an act of parliament was passed for the double purpose of compelling ships to sail with convoy, and, by a moderate tax on foreign commerce, to raise a revenue sufficient to defray the extraordinary expences of providing an adequate naval force for this purpose.

By stat. 38 G. III. c. 76. § 1. it is enacted, 'That 'no ship or vessel belonging to his Majesty's subjects, '(except as therein-after is excepted), shall sail or depart 'from any port or place whatsoever, unless under the 'convoy and protection of such ship or ships as may be 'appointed for that purpose.'

By stat. 38 G. III. c. 76. § 1. No ship belonging to his Majesty's subjects (except as hereafter) shall sail from any port without convoy.

'That the master or other person having the charge or 'command of every ship or vessel, which shall sail or 'depart under the protection of convoy, shall and is 'thereby required to use his utmost endeavours to con'tinue with such convoy during the whole of the voyage, 'or during such part thereof as such convoy shall be di'rected to accompany and protect such ship; and shall 'not wilfully separate or depart therefrom upon any pre'tence whatever, without order or leave for that purpose 'from the officer having the command of such convoy.'

§ 2. The master of every ship sailing under convoy, shall do his utmost to continue with the convoy, and shall not quit it without leave.

'That if the master or commander of any ship, 'which is by this act required not to sail without convoy, 'shall sail without convoy; or having sailed with convoy, 'shall wilfully depart therefrom without leave first ob'tained from the person entrusted with the charge of such 'convoy, every such master shall forfeit 1000l. and in 'case the whole or any part of the cargo consisted of na'val or military stores, the penalty is 1500l. with a power 'in the court, where the action may happen to be brought,

§ 3. Any master sailing without convoy, or quitting it without leave, shall forfeit 1000l.; and in case the cargo consists of naval or military stores, 1500l.

'brought, to mitigate the penalties, so as that they are not 'reduced to a less sum than 50l. (*a*).

§ 4. In case of a sailing without, or deserting, convoy, the insurance on the ship shall be void; and the premium shall not be recoverable back.

'That in case of a sailing without, or a wilful desertion of, convoy, every insurance, or contract or agreement for any insurance, upon such ship, or goods, wares or merchandize laden thereon, or upon any property, freight, or other interest arising out of the same, whereon insurances may be lawfully made, (and which shall be the property of the master or commander of the ship, so sailing without convoy, or wilfully quitting the same, or if any person interested in such vessel or cargo, who shall have directed or been any way privy to, or instrumental in causing such ship or vessel to sail without convoy, or wilfully to separate therefrom), shall be null and void to all intents and purposes both at law and in equity, any contract or agreement to the contrary notwithstanding; and that nothing shall be recovered thereon by the insured for loss or damage, or for the premium, or consideration in nature of premium, which shall have been given for such insurance: And if any party to such insurance, or any broker or other person shall transact a settlement, or allow any money in account, on such insurance, every such person shall forfeit 200l.'

§ 5. Before any ship shall clear outwards, bond shall be given that she shall not sail without, or desert convoy.

'That the officers of the customs shall not permit vessels to clear outwards, till bond has been given with one surety, in the penalty of the value of the ship, with condition that the ship shall not sail without, nor wilfully desert, the convoy.'

(*a*) In *France* the punishment for quitting convoy was much more severe. By an ordinance of 1689, the master of a merchant ship, separating from his convoy, was condemned to the gallies. This punishment, by an ordinance of 1745, was moderated to a fine of 1000 livres, a year's imprisonment, and being delared incapable of ever commanding any vessel at sea.—By an ordinance of 1765, the commander of the convoy is directed to give an account to the secretary of state for the marine department, of such masters of merchant ships as navigate badly, or delay the convoy. Vid. *Emerig.* tom. I. p. 167. 443.

'But

'But this act is not to extend to veſſels, not required 'to be regiſtered by any acts then in force; nor to any ſhip 'having a licence ſigned by the Lords of the Admiralty 'to ſail without convoy, or by ſuch perſons as ſhall be 'duly authorized by them for that purpoſe; or to any ſhip 'proceeding with due diligence to join convoy from the 'port or place of departure, except as to the bond hereby 'required to be taken upon the clearance outwards; or to 'any ſhip bound to or from any port in *Ireland*; or to ſhips 'bound from one port to another in *Great Britain*; nor 'to ſhips in the ſervice of the *Eaſt India* or *Hudſon's Bay* 'companies.'

§ 6. This act is not to extend to veſſels not required to be regiſtered, nor having licences to ſail without convoy, or going to join convoy, or bound to *Ireland*, or from one port to another in *Great Britain*, or to the ſhips of the *India* or *Hudſon's Bay* companies.

'That this act is not to extend to ſhips ſailing from 'foreign ports, in caſe no convoy is appointed by the 'Lords of the Admiralty of *England*, or perſons autho- 'rized by them at ſuch foreign ports to appoint convoys, 'or to grant licences for ſailing without convoy.'

§ 8. Nor to ſhips ſailing from foreign ports, where no convoy is appointed.

'That the Lords of the Admiralty are to give notice 'in the *London* and *Dublin Gazettes*, that maſters of ſhips 'ſhall have on board, flags and vanes for the purpoſe of 'diſtinction, and of anſwering ſignals; and without 'which they are not to be cleared outwards.'

§ 9. Maſters of ſhips ſhall have flags, &c. to anſwer ſignals.

'That ſo much of the ſtat. 33 G. III. ch. 66, ſect. 8, 'as makes the maſters of ſhips under convoy liable to be 'articled in the Court of Admiralty, for diſobeying ſig- 'nals or other lawful commands of the commodore, or 'deſerting convoy, and finable at the diſcretion of the 'ſaid court, in any ſum not exceeding 500l. and puniſh- able by impriſonment, not exceeding one year, ſhall be 'painted on a board, and affixed on ſome conſpicuous, 'and convenient part of every ſhip which by this act is 'required not to ſail or depart without convoy; and that 'in default thereof, every maſter or other perſon, having 'the charge or command of any ſuch ſhip, ſhall forfeit, 'for every ſuch offence, the ſum of 50l.

§ 10. The clauſe of the 33 G. III. c. 66. for puniſhing maſters for deſerting convoy or diſobeying ſignals, ſhall be put up in every ſhip on pain of 50l.

'That if any ſhip, required by this act not to ſail with- 'out convoy, ſhall be in imminent danger of being taken 'by the enemy, the commander of the ſhip ſhall make 'ſignals by firing guns to convey information of his dan- 'ger to the reſt of the convoy, as well as to the ſhips 'of war under the protection of which he is ſailing; and

§ 11. Ships in danger of being taken ſhall make ſignals, and if taken the maſter ſhall deſtroy his ſailing inſtructions on pain of 100l.

'that in case he is taken possession of, he shall destroy all 'instructions confided to him relating to the convoy; and 'every commander wilfully neglecting to make such 'signals, or to destroy such instructions, shall, for every 'such offence, forfeit a sum not exceeding 100l.'

These are the principal clauses relating to sailing with convoy; the rest of the act is employed in fixing the duties, and directing how they shall be collected.—This act being to continue during the then hostilities with *France*, expired upon the ratification of the peace of 1801, and was re-enacted upon the renewal of the war in 1803 by stat. 43 *G.* III. c. 57, which is to continue in force during the present hostilities with *France*.

A foreign-built ship, though *British* owned, is not required to be registered; therefore she may sail without convoy, and without a licence to do so.

The sixth section of this act provides that it shall not extend to vessels *not required to be registered*. A foreign-built ship, though *British* owned, is not required to be registered, by any of the register acts; and therefore an insurance on such a ship is good, though she sail without convoy, and without a licence to do so.

Long v. *Duff*, and *Long* v. *Bolton*, 2 *Bos.* & *Pul.* 209.

A foreign built ship, *British* owned, sails without convoy, and without a licence so to do.—The ship being within the exception of the 38 *G.* III. c. 76, § 6, a policy on her will be good; and it is not necessary to communicate to the underwriters at the time of making the policy, that the ship is foreign built.

Thus.—The ship *Lucy* was insured in several policies, 'At and from *Padstow* in *Cornwall* to *Leghorn*.'—She was *Spanish* built and purchased at *Hamburgh* by the plaintiff, a *British* subject.—She was not registered, but had paid the alien duties. Previously to her sailing on the voyage insured, the captain applied for a licence to proceed without convoy to *Leghorn* and *Naples*, but only obtained a licence for *Naples*, without convoy, and was captured off that place by a *French* privateer. The only difference between the two cases was, that in the former it was represented to the underwriters, at the time of effecting the policy, that the *Lucy* was a foreign-built ship, and not registered; in the latter, no such representation was made.—It was objected, in both actions, that as the licence obtained did not extend to the voyage insured, the *Lucy*, though foreign built, and *British* owned, was within the provisions of the stat. 38 *G.* III. c. 76, the convoy act, which makes void all policies upon ships sailing without convoy; and in the second, that supposing her not to be within the provisions of that act, that circumstance ought to have been communicated to the underwriters.—Upon the trial it was left to the jury to determine

mine whether, according to the usage of merchants, it was the duty of the insured to give this information, or of the underwriter to satisfy himself upon that point. The jury decided, that it was the business of the underwriter to obtain this information for himself.—Upon motions for new trials in these causes, the court decided, that it was properly left to the jury to determine this point, and also that foreign built ships in the hands of *British* owners are not required to be registered, and therefore, that the verdicts for the plaintiff must stand.—Lord *Eldon*, in delivering the opinion of the court, said:—" With respect to the general point, the question is, whether a vessel in the situation of the *Lucy*, departing without convoy, not having obtained a proper licence so to do, can be deemed to be protected by the policy, or, whether that policy be not altogether void under the provisions of the stat. 38 *G.* III. c. 76, § 4 (*a*). The policy of this act, as stated in the preamble, is, 'that it will add to the security of 'trade to prevent ships sailing without convoy, except 'in certain cases.' This will undoubtedly apply to ships foreign built. But whether it was intended to be carried to that extent, is the question we are now to decide; and that we must do by examining the clause which is to carry the principle into effect.—The *sixth* section of that act provides that nothing in the act contained, by which ships are required not to depart without convoy, shall extend to any ship or vessel, *which is not required to be 'registered* by any act or acts of parliament in force on 'or immediately before the passing of this act.' The true question then, is, whether this ship was required to be registered by any statute in force when the convoy act passed. She was foreign built, and purchased previously to the time when the prohibition took place; and in order to ascertain whether she, being *British* owned, be required to be registered, or not, we must look back to our navigation laws." His Lordship then took a most comprehensive and accurate view of all the navigation laws relating to to the registry of shipping, down to the last

(*a*) Sup. 380.

register acts, 26 G III. c. 60 and 27 G. III. c. 19. He then said,—"After the best consideration which I have been able to give the *register act*, and after conversing with the noble lord who framed it (*a*), as well as with the learned author of the treatise to which it gave rise (*b*), the determination I have come to is, that foreign built ships, in *British* ownership, are not required to be registered, and consequently that this verdict must stand." His Lordship then examined the several clauses of the register acts, 26 G. III. c. 60, 27 G. III. c. 19, and 34 G. III. c. 68, and said,—"It is not said that ships not registered shall not be navigated or owned by *British* subjects. A *British* owner of a foreign built ship may engage in neutral trade, and will be liable to the alien duties; but it was not the policy of the legislature to prevent *British* subjects from employing foreign ships in neutral trade, in as ample a manner as they can be employed by aliens."

Sect. VI.

Of the Warranty of Neutrality.

THE cases on this branch of the law of insurance often involve certain rules of the law of nations, which, though formerly considered as indisputable, have, in modern times, and particularly since the period of the *French* revolution, been not only controverted, but even new and contrary principles set up from time to time in opposition to them, as the interest or ambition of certain states has dictated. This has necessarily produced a great variety of decisions since the former impression of this work, which have unavoidably swelled this section beyond its

(*a*) Lord *Hawkesbury*, now Earl of *Liverpool*, to whom his country is highly indebted for the many excellent and judicious regulations he has introduced upon this most important subject.

(*b*) *John Reeves*, Esq. who has very much promoted the commercial interests of *Great Britain* by his valuable history of the law of shipping and navigation.

ordinary

ordinary proportion. We will, however, according to our former diſtribution, conſider

1ſt, *The nature of this Warranty*;

2dly, *When it ſhall be falſified by a judgment of condemnation as prize*; and,

3dly, *What ſhall amount to a forfeiture of neutrality.*

1. *The nature of this Warranty.*

As the premium is meant to be proportioned to the nature of the riſk, and as the general words of the policy, unleſs reſtrained or qualified by ſome ſpecial ſtipulation, ſubject the inſurer to every loſs by capture, it is of importance, in times of war between maritime ſtates, to aſcertain whether the ſhip or goods meant to be inſured be liable to capture, as belonging to either of the belligerent powers, or for a forfeiture of neutrality. If the inſured profeſs to be the ſubject of a neutral ſtate, and mean to be inſured as ſuch, the inſurer requires him to *warrant* the ſhip or goods to be neutral property. This is done by inſerting in the policy either the words, '*warranted neutral*,' or, '*neutral property*;' and ſometimes the thing inſured is repreſented as *belonging to* the ſubjects of ſome neutral ſtate, which, of itſelf, is equivalent to a warranty (*a*). How expreſſed in the policy.

Neutral property, in the ſenſe in which that expreſſion muſt be underſtood in this warranty, is that which belongs to the ſubjects of a ſtate in amity with the belligerent powers. What ſhall be deemed neutral property.

But it is of importance to obſerve that if the ſubject of a neutral ſtate be domiciled in the dominions of one of the belligerents, and carry on commerce there, though he continue to owe allegiance to his natural ſovereign, and may at any time, by returning to his native country, recover all the privileges belonging to a ſubject of that country; yet, while he reſides in the dominions of a belligerent, he contributes to the wealth and ſtrength The ſubject of a neutral ſtate domiciled in the dominions of a belligerent, loſes the protection of the neutral flag.

(*a*) R. *Lothian* v. *Henderſon*, 3 *Boſ.* and *Pul.* 499, inf. As to the manner and time of making ſuch repreſentation, vid. inf. ch. 10. Prelim. Ob.

 of

of such belligerent, and is therefore not entitled to the protection of the neutral flag, and his property shall be deemed enemy's property, and liable to capture as such by the other belligerent.

Tabbs v. Bendelack, 3 *Bos.* and *Pul.* 207, n. S. C. 4 *Esp.* Rep. 108.

The plaintiff an *American* born, but settled in *England*, and carrying on commerce there, purchases an *American* ship regularly documented in *America*:—This ship is not neutral to the purpose of being protected by the *American* flag.

Thus:—The freight of the ship *Franklin*, warranted *American*, was, in *December* 1800, insured 'At and from 'Liverpool to *Naples* or *Sicily*, with leave to discharge at *Leghorn*.'—The ship was captured by the *French*. In an action to recover for this loss, it appeared that the plaintiff was an *American* born, had resided in *America*, and had been employed in navigating ships between this country and *America*; that having married at *Liverpool*, he had from the year 1797 occupied a house there, in which his wife and children resided; that since that time he had once or twice navigated a ship from *Liverpool* to *America*, and back again; but that, during the last year, he had never been out of *England*, but had employed others to navigate his vessels to *America* and elsewhere; that in *October* 1800 he had purchased the *Franklin*, which was an *American* ship, and regularly documented as such, from her owner, an *American*, and had brought her over from *America*; and that when the voyage to which the policy related should be completed, the plaintiff intended to return in her with his family to *America*.—It was contended on the part of the defendant that the warranty was false, in as much as the plaintiff was residing under, and entitled to, the protection of *Great Britain*, and had no right to set up his privilege as an *American* citizen against the adverse belligerent power.—For the plaintiff it was insisted that his residence here was merely temporary; that he had the *animus revertendi*, and was therefore entitled to warrant his ship *American*.—The plaintiff was nonsuited.—Lord *Kenyon*, who tried the cause, said, "Whether the plaintiff has the intention of returning to *America* or not, at a future period, cannot affect the present question. In the policy he has warranted the ship to be *American*; from which warranty the underwriters collected that she was entitled to the privileges of an *American* ship. But whether the ship be entitled to those privileges or not, does not depend merely upon her owner being an *American* born. Persons residing in this country, reaping the advantages

advantages of its trade, contributing to its well-being, must, for the purposes of trade, be considered as belonging to this country. By the law of nations, therefore, the property of such a person is liable to capture by a belligerent on the ground of its belonging to a subject of this country. That rule of law was acted upon in the *St. Eustatia* cases at the *Cockpit*, when Lord *Camden*, and some of the greatest persons that ever adorned the law of this country, presided there. In the case of the *Argonaut* (*a*), though we were of opinion that *Collet*, being a native of this country, could not put off his allegiance to it, but might be guilty of high treason against the state; yet we thought that, being domiciled in *America*, he was entitled to the privileges of an *American*."

It is sufficient it be true when made.

If the warranty be false at the time it is made, the policy will be void *ab initio*. But the following case shews that it is sufficiently true if the thing insured be neutral property *at the time when the policy is effected*; the chance of future war being always a risk within the policy.

Eden v. *Parkinson*, *Doug.* 705. S. P. ruled in *Saloucci* v. *Johnson*, *Park* 364, and admitted in *Tyson* v. *Gurney*, 3 T. R. 477.

A ship warranted neutral on the 28th of *November*, sails on the 11th of *December*. Hostilities commence on the 20th of *December*, and she is captured on the 25th:—This does not falsify the warranty, and the insurer is liable.

A *Dutch* ship and cargo were insured, 'At and from '*L'Orient* to *Rotterdam*, both *warranted neutral* property.' —The ship being captured by an *English* man of war, an action was brought on the policy; and the declaration stated that the defendant subscribed the policy on the 28th of *November* 1780, and averred that the ship and cargo were, *at that time*, neutral property.—Upon the trial it appeared that the ship sailed from *L'Orient* on the 11th of *December* 1780, and both ship and cargo *were then neutral property*, and so continued till the 20th of *December*, when, hostilities having commenced between the *English* and the *Dutch*, the ship and cargo ceased to be neutral property, were taken on the 25th of *December*, and condemned as lawful prize.—The court, upon this case, were clearly of opinion, that the plaintiff was entitled to recover.—Lord *Mansfield* said,—"The insured warranted the ship and cargo neutral property, and the defendant would have the court to add, by construction, "*and so* "*shall continue during the whole voyage*." The contract

(*a*) *Wilson* v. *Marryatt*, 8 T. R. 31, sup. 68.

was not so. The insured told the underwriters what was the state of the ship and goods *then*; and the insurers took upon themselves all future events and risks, from men of war, enemies, detentions of princes, &c. The owners themselves could not have changed the nature of the property; but they did not mean to run the risk of the war. If it would have made a difference to what country the property belonged, the underwriters should have enquired. The risk of future war is undertaken by the insurer in every policy. The warranty is, that things stand so at the time, not that they shall continue so."

The chance of future war is always a risk within the policy.

2. *When this Warranty shall be falsified by a Judgment of Condemnation as Prize.*

The evidence usually adduced to falsify this warranty, or to prove a breach or forfeiture of neutrality, which amounts to a breach of the warranty, is the judgment or sentence of a court of admiralty, or other court having jurisdiction in questions of prize, by which the ship or goods insured, and warranted neutral property, have been condemned as prize. Copies of the sentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed sufficient evidence of the fact of the condemnation, and of the grounds upon which it proceeded (*a*).

Under this head we will consider *first*, what shall be deemed a court of competent jurisdiction in questions of prize; and *secondly*, when the sentence of such court shall be deemed conclusive evidence to falsify the warranty.

First.—What shall be deemed a court of competent jurisdiction in questions of prize.

A sentence, to be binding in *England*, must be the sentence of a court of competent jurisdiction.

In order that a foreign sentence may be received in our courts as admissible evidence, and possess the authority ascribed to it, the court in which it was pronounced must appear to have been a court lawfully constituted, and of

(*a*) R. Anon. 9 Mod. 66. R. *Walrond* v. *Van Moses*, 8 Mod. 322. Vid. 12 *Vin.* Ab. 87.

competent

competent jurisdiction in such matters. And therefore, if it appear to have been held under any usurped or illegal authority, or contrary to the law of nations, the sentence will have no validity.

This was determined by the learned judge of our court of admiralty, on the 16th of *January* 1800, in the case of the ship *Flad Oyen*, which had been captured by the *French*, carried into *Bergen* in *Norway*, condemned by the resident consul there, and purchased by a *Danish* subject. —One question before the court of admiralty was, whether a sale under such a sentence of condemnation would transfer the property to the neutral vendee.—Upon this point the learned judge declared that sentences of condemnation always appeared to be the sentences of courts acting, and exercising their judicial functions, *in* the belligerent country; and that this was the very first attempt that had ever been made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral sovereign; that, even if it could be shewn that, upon mere speculative principles, such a condemnation ought to be deemed sufficient, that would not be enough; for it ought to be shewn that it was agreeable to the usage and practice of nations; "and when I am told," said he, "that before the present war, no sentence of this kind was ever produced in the annals of mankind, and that it is produced by one nation only in this war, I require nothing more to satisfy me that it is the duty of this court to reject such a sentence as inadmissible."

Case of the *Flad Oyen*. 1 Rob. Adm. Rep. 135.

The sentence of a consul of a belligerent power *resident in a neutral state*, has no authority in our courts.

The ground of this doctrine is, that it shall not be presumed that a neutral government would so far depart from the duties of neutrality, as to permit within its territory the exercise of that last act of hostility, the condemnation of the property of one belligerent to another; thereby confirming and securing him in the acquisition of his enemy's property by hostile means (*a*).

The ground of this doctrine.

(*a*) Per Sir *William Scott* in the case of the *Christopher*, 2 Rob. Adm. Rep. 209.

Recognised in our courts.

This decision of the court of admiralty, and the reasons on which it was founded, have since been fully approved and adopted by the court of King's Bench in the case of *Havilock* v. *Rockwood* (a), which will be more particularly noticed hereafter. For the present it will be sufficient to state that it was there determined, that a condemnation by the *French* consul at *Bergen* in *Norway* had not the effect of devesting the property of a captured ship out of the original owner.

Smith v. *Surridge*, 4 *Esp.* Rep. 25. Sup 200.

But if the neutral state acquiesce, the condemnation will be valid,

Yet where a *Dutch* ship was captured by the *French*, and condemned by the *French* court of prize sitting at *Bergen*, and sold to a *Danish* subject, and by him sold to the plaintiff, it was objected, in an action on a policy on the ship, that this was no evidence of a legal title in the plaintiff;—But Lord *Kenyon* said, that though the sentence of a *French* court of prize, sitting in a neutral country, had been wisely holden not to change the property; yet, where it had been acquiesced in by that country, it might make a difference; and that, as the property had been regularly brought down to the plaintiff from the time of the sale under the sentence, he was of opinion that it was sufficient evidence of a legal title in him.

But if the ship be carried into the port of a co-belligerent, and while there, be condemned in the state of the captors, the sentence will be valid.

But, with respect to condemnations passed upon ships *brought into the ports of an ally* in the war, there is a common interest between the co-belligerents on the subject; and both governments may be presumed to authorize any measures conducing to give effect to their arms, and for that purpose to consider each other's ports as mutually subservient to that end.—Therefore, where a *British* ship, captured by the *French*, and carried into the port of *St. Sebastian* in *Spain*, then an ally of *France*, and at war with *Great Britain*, was condemned at *Bayonne* in *France*, the ship still lying in the *Spanish* port, this condemnation was holden to be valid (b). So likewise, where a *British* ship, taken by the *French*, was carried into *Helvoetsluys*, and condemned by the *French* commissary of marine at *Rotterdam*, the *United States* then being in

(a) 8 T. R. 268. inf. c. 13. § 2.——(b). Per Sir *William Scott*, in the case of the *Christopher*, 2 *Rob.* Adm. Rep. 209.

alliance

alliance with *France* and at war with *Great Britain*, the legality of this condemnation was admitted by our court of admiralty (*a*).

Oddy v. Bovill, 2 East 473.

S. P.

Therefore, where an insurance was made on a bottomry bond on the *Frow Anna*, a *Danish* ship, in a voyage from *Penzance* to *Genoa*; and the ship being captured by a *French* privateer, carried into *Malaga*, and there condemned by the *French* consul residing at that place, on the ground of her being *British* property, the court of *King's Bench*, on the authority of the above decisions, determined that the sentence of condemnation was valid and conclusive to prove that the ship was not *Danish*.

Secondly,—When the sentence of such court shall be deemed conclusive to falsify the warranty.

This is often found to be a very perplexing question. It has produced much litigation, and many decisions, that cannot be easily reconciled or reduced to any well defined principle.

By comity the sentences of foreign courts are conclusive in ours.

A certain *comitas gentium*, as it has been called, is said to prevail amongst all civilized states, by which the judgments of tribunals having competent jurisdiction, in any one state, are regarded in the courts of all others as conclusive upon the subjects upon which they have been pronounced; and this is now holden to be so binding upon the tribunals of this country, that the decisions of foreign courts of prize are holden to be conclusive upon all points within their jurisdiction, and which they have professed to determine, even though such decisions be manifestly unjust (*b*).

This comity is not universal.

Whether such comity do, in truth, prevail in any other country than our own, I have not been able, after some enquiry, to learn. Certain it is, that the tribunals of *France* never carried their complaisance so far. The

(*a*) In the case of the *Betsy, Kruger*, 2 *Rob.* Adm. Rep. 210, n. —(*b*) Vid. Lord *Kenyon's* judgment in *Guyer* v. *Aguilar*, 7 T. R. 681, inf.

 judgments

judgments of foreign courts, at leaſt thoſe of the enemies of that country, have there no weight or authority againſt *Frenchmen*; and therefore every queſtion decided by any foreign, or at leaſt by an enemy's tribunal muſt, in their courts, be examined and determined *de novo* (*a*).

Hughes v. *Cornelius, Carth.* 32, *T. Ray.* 473, *Skin.* 59. Cited *Show.* 143, *Comb.* 121.

That the ſentence of a foreign court of admiralty is, in our courts, concluſive upon the points within its juriſdiction, and which it profeſſes to decide, was firſt determined in the court of *King's Bench* in Mich. Term 34 Ch. II. in the caſe of *Hughes* v. *Cornelius*, where a ſhip which had been *Dutch*, but was afterwards made *Engliſh*, was taken by the *French* and condemned as a *Dutch prize*. An *Engliſh* merchant bought the ſhip of the *French*, and brought her to *England*, where the original owner claimed her, and brought an action of trover againſt the purchaſer.—But the court gave judgment for the defendant, without ſuffering the queſtion to be argued; being clearly of opinion that the ſhip, being legally condemned in *France* as a *Dutch* prize, the court here would not examine the proceedings of the *French* court of admiralty, but give credit to its ſentence, and would take it to be according to right. Becauſe it would be very inconvenient if the courts in one kingdom ſhould correct the judgments and proceedings of thoſe of another, and if the original owner were aggrieved, he might petition the king, who, by his ambaſſador at the court of *France*, might demand that right ſhould be done; if this were refuſed, he would grant letters of repriſal.

Though the court refuſed to hear any argument in this caſe, the reaſons given in ſupport of their judgment do not ſeem

(*a*) *Les jugemens rendus par les tribunaux étrangers ne ſont en France d'aucun poids contre les François. Il faut que la cauſe y ſoit de nouveau décidé.—D'où il ſuit que le jugement de confiſcation, prononcé par un tribunal ennemi, n'eſt ni une preuve que le veritable pour compte ait été caché, ni un titre que les aſſureurs puiſſent alléguer pour ſe diſpenſer de payer la perte. Telle eſt notre juriſprudence.* Emerig. tom. 1. p. 458.

feem very fatisfactory. The rule, however, as laid down by them, has been acknowledged to be law, and has been acted upon as fuch from that time to the prefent (*a*). And yet there is a material diftinction between that cafe and the cafes to which the rule there laid down has been fince fo often applied. *France*, at the time *Hughes* v. *Cornelius* was determined, was in amity with *England*. But the foreign fentences to which our courts have fince given fo much credit, and which they did not think themfelves at liberty to examine, have all been the fentences of *enemies'* tribunals; fo that a principal argument in fupport of the decifion in *Hughes* v. *Cornelius* does not apply to thefe cafes; for if wrong be done by an enemy's tribunal, there can be no redrefs.

The confequences of this rule were not at firft forefeen.

But the judges who adopted this dogma did not forefee all its confequences. Since that cafe, great and manifeft injuftice has, in many inftances, arifen from it. This has naturally led to exceptions, and thefe exceptions have unavoidably induced the neceffity of reviewing and examining foreign decifions. But it being foon perceived that this would occafion all the trouble and inconvenience which the rule laid down in *Hughes* v. *Cornelius*, was meant to obviate, the courts, at the apprehenfion of this, feem to have ftarted back, and to have haftily returned to the original rule. Neutrals have, therefore, to protect themfelves againft the caprice and injuftice of foreign tribunals, reforted, as we fhall prefently fee (*b*), to the expedient of inferting in their policies an exprefs ftipulation that, in cafe of capture, certain fpecified proofs of neutrality fhould be deemed conclufive, notwithftanding any

Stipulations that certain proofs of neutrality fhall be conclufive.

(*a*) All the cafes upon the effect of the judgments both of foreign and domeftic tribunals will be found in the arguments of Mr. *Wallace* and Mr. *Mansfield* in the Duchefs of *Kingfton's* cafe, 11 *Harg.* State Tri. 205, and in the admirable argument of Lord C. J. *De Grey* in the fame cafe, p. 261.—Vid. *Walker* v. *Witter*, and the notes on that cafe *Doug.* 3d edition, p. 1. Vid. 12 *Vin.* Ab. 86.——(*b*) Vid. *Lothian* v. *Henderfon*, 3 *Bof.* and *Pul.* 449. inf.

foreign

foreign ſentence of condemnation to the contrary. The examination of theſe ſtipulated proofs of neutrality will not be very unlike a reviſion of foreign ſentences.

As to theſe ſentences, this is clear, that if it be adjudged that the ſhip or goods inſured were *enemys' property*, and this appear on the face of the ſentence to be the ground of the condemnation, the ſentence will be concluſive to falſify the warranty.—So, if the ſentence proceed on the ground that the ſhip did *not* belong to the country ſpecified in the warranty, it will be concluſive, though it expreſs no other ground of condemnation.

Fernandes v. *Da Coſta*, at N. P. after Hil. 4 G. III. *Beawes*, 314.

If the ground of the ſentence do not appear on the face of it, it may be ſhewn by other evidence.

As where goods were inſured on board a ſhip, warranted *Portugueze*, the plaintiff gave colourable evidence that the ſhip was *Portugueze*; but that, being obliged, by the perils of the ſea, to put into a *French* port, the cargo was ſpoiled and the loſs incurred. This was admitted by the defendant, but he alledged that, while the ſhip was in the *French* port, ſhe was libelled againſt, and condemned; and to prove this, he produced the ſentence of condemnation, and confirmation thereof, in the courts of prize in *France*, together with an anſwer of the plaintiff to a bill in Chancery, wherein he had admitted that the ſhip was condemned as not being *Portugueze*; and he contended, that though the goods were loſt by a different peril from that of being enemy's property, yet, that, in fact, the ſhip was not *Portugueze*, though warranted ſuch, and this vitiated the policy *ab initio*. This was agreed to be law. Lord *Mansfield* ſaid:—"As the ſentence was general, and did not expreſs the ground of the condemnation, atteſted copies of the *libel* ought, in ſtrictneſs to have been produced, to ſhew upon what ground the ſhip was libelled againſt; but as the plaintiff, by his anſwer in Chancery, has admitted that the ſhip was condemned as not being *Portugueze*; this, added to the expreſſion uſed in the ſentence of confirmation, viz. that the ſhip was condemned in the *court of prizes*, amounts to ſufficient evidence to proceed upon." The defendant had a verdict.

But if the ſentence be ambiguous, it will not be concluſive.

But if the ſentence be ambiguous on the face of it, and there be reaſon to ſuppoſe that it proceeded on a different

ground from that of enemy's property, it will not falsify the warranty.

Bernardi v. Motteux, Doug. 554.

The sentence of a *French* court of admiralty stated, 'that the 'captured ship 'was on her 'voyage to an 'enemy's port 'with goods 'consigned to 'persons there, 'though stated 'in the bills of 'lading to be-'long to neu-'trals, and there 'being *reason to suspect* that the 'captain had 'thrown his pa-'pers overboard, 'therefore the 'ship and car-'go are con-'demned as 'prize;"—This being ambiguous, and there appearing reason to suppose that the ground of the sentence was the throwing the papers overboard, contrary, to a *French* ordinance, it was held not to be conclusive evidence to falsify the warranty.

Thus:—An insurance was made upon freight and goods, 'At and from *Venice to London, warranted neutral ship and* '*neutral property*.'—The ship on her voyage was taken by a *French* frigate and condemned. Upon the trial, the defendant produced an attested copy of the sentence of condemnation of the *French* admiralty court, as conclusive evidence to shew that the ship and cargo were not neutral property. This sentence, after stating, from the *procés verbal* made when the ship was taken, the capture of the ship, and the endeavour of the captain to avoid coming on board the frigate with the ship's papers, stated, 'that the 'captain being at last obliged to comply, upon threats 'being made of firing on him, and being come on board, 'he declared that, *in getting up the ship's side, the box con-'taining his muster-roll, his patents, and passport, had fallen 'from his pocket into the sea, and only shewed his bills of lading*, 'by which it appeared that the ship, commanded by a '*Venetian*, sailed from *Venice* with a cargo of silk, raisins, 'oil, &c. *for the account of sundry persons in Venice consigned 'to sundry persons in* London. That these goods *going to* '*an enemy's country, and the loss of his papers raising suspicions*, 'the ship was stopped and sent into *Almeiria*.' The sentence then states that, '*These premises being considered*, the 'ship and cargo are declared *good prize*, and adjudged to the 'captors.'—In the course of the argument, an *arrêt* for the regulation of the *French* marine, dated the 26th of *July* 1778, and the *procés verbal* made at the time of the capture, though not proved at the trial, or stated in the case, were much referred to. By this *arrêt*, art. 3. 'All 'vessels with their cargoes, whether neutral or allied, from 'which *any papers* have been thrown into the sea, sup-'pressed or abstracted, shall be declared good prize.' In the *procés verbal* it was expressly stated, 'that the ship's go-'ing to an enemy's country, and the loss of her papers, by 'falling into the sea, raising suspicions, she was stopped '*in consequence of the third article of this arrêt*.' It was contended on the part of the plaintiff, that the condemnation was not founded on any proof that the property

property was not neutral, but on the authority of the *arrêt*, on account of the papers having been thrown into the sea. If this had been done wilfully it would have been fraud or barratry in the master, which was one of the risks insured against; but it was no evidence of enemy's property.—For the defendant it was insisted that, though the sentence did not, in words, declare the ship and cargo to have been condemned, *as enemy's property*, which it is not the practice to do; yet, that that appeared from necessary inference to have been the ground of the condemnation; and throwing the papers into the sea *was only evidence* of that fact.—Mr. Justice *Buller* being of opinion that, *on the case as stated, without the procés verbal*, the interpretation of the sentence was, that the condemnation went on the ground of *enemy's property*, it was proposed to the defendant to agree that the *procés verbal* should be made part of the case, which would explain the ambiguity of the sentence; by shewing the *arrêt* to have been the ground of the capture. This was refused by the defendant.—Lord *Mansfield* was of opinion, however, that the justice of the case might still be got at, on the ground of the *ambiguity* of the sentence, which did not mention a word of *enemy's property*: that it was clear the *French* admiralty meant to proceed on the ground of *throwing the papers overboard*; and that the *procés verbal* ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it.—It being alleged by the defendant's counsel, that it would be dangerous to open the sentences of foreign courts of admiralty, which are usually informal; and that the consequence of this decision would be, that, in all cases of this sort, there would be controversies about the ground of the foreign sentence, Lord *Mansfield* said that this supposed inconvenience would be entirely obviated if the foreign courts would say, in their sentences, "*Condemned as enemy's property.*"—Mr. Justice *Willes* and Mr. Justice *Ashhurst* concurred with Lord *Mansfield*, and there was judgment for the plaintiff, Mr. Justice *Buller* still adhering to his former opinion.

In

In every maritime war, the belligerent powers take upon themselves to make various marine regulations, adapted to their own respective situations and interests; but often contrary to the law of nations, and inconsistent with the independence of other states. And though it may be prudent for the subjects of neutral states, which are unable, or unwilling, to contend with such belligerent powers, to conform to these regulations, for their own safety, yet it seems to be now settled, that they are not bound by them; and therefore, a condemnation avowedly grounded on the non-observance of them, will not amount to proof of the forfeiture of the warranty.

But neutrals are not bound to take notice of regulations made by belligerents contrary to the law of nations.

As where a ship, *warranted Portugueze*, was taken by a *French* privateer, and condemned, "*because she* "*had an English supercargo on board.*"—It appeared that the *French* government had lately made an ordinance, declaring all ships liable to capture, where the supercargo was the subject of a state at war with *France*.—The plaintiff obtained a verdict, and upon a motion for a new trial, the court determined that the warranty was not falsified by this condemnation, and that the plaintiff was entitled to recover.—Lord *Mansfield* said:—"This is an arbitrary and oppressive regulation, contrary to the law of nations. But as neither the insured nor the underwriters knew any thing of it, neither of them was guilty of any fault. If the insured had known of it, he might have taken care to conform to it: If the underwriters had known of it, they ought to have enquired who was to be supercargo. Both, however, being innocent, the underwriters, who take the risk upon themselves, ought to be liable for the loss. It must be a fraudulent concealment to vitiate a policy. It is remarkable that neither party has said any thing of the treaties between *France* and *Portugal*."

Mayne v. *Walter*, Br. R. East. 22 G. III. MS.

A ship warranted *Portugueze* is condemned by the *French*, because she had an *English* supercargo on board, contrary to a *French* ordinance: This ordinance being contrary to the law of nations, the sentence does not falsify the warranty.

This last observation shews that, if the having an *English* supercargo on board had been contrary to any subsisting treaty between *France* and *Portugal*, the condemnation would have been just, and the sentence conclusive, to shew a forfeiture of the ship's neutrality. The following decision will serve to confirm this doctrine.

But if a ship be not navigated according to the subsisting treaties, she will forfeit her neutrality.

A ship

Barzillay v Lewis, B. R. Trin. 22 G. III. MS.

A ship warranted *Dutch*, is condemned because she had not the necessary documents to prove her to be such, according to the treaty of *Utrecht*:—This falsifies the warranty.

A ship was insured from *Liverpool* to *Amsterdam*, '*warranted* Dutch *property*,' and was captured by the *French*, carried into *St. Maloes*, and there released as being *Dutch* property; but upon appeal to the council of state at *Paris*, she was condemned as prize, by the name of *The Three Graces*, *of Liverpool*.—It appeared that the ship had been originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *English* privateer, and carried into *Liverpool*; and being condemned, she there got the new name of *The Three Graces*. A merchant at *Liverpool* bought her for a house at *Amsterdam*, from whence a *Dutch* pass or sea-brief was sent for her, translating her new name into *Dutch*, according to the treaty of *Utrecht*. She sailed from *Liverpool*, under a *Dane*, who was her captain, and a crew, consisting of 16, of whom five were *French*, who had been prisoners of war, and were returning home, four *Danes*, two *Swedes*, one *Dutch*, one *Portugueze*, one *Hamburger*, one *Norwegian*, and one *Irish*. It appeared in evidence that by a *French* ordinance it was provided, 'That ships originally belonging to the enemy, and purchased by neutrals, are not considered as domiciled till they have been within some port of the neutral nation;' and, 'that a pass should be deemed fraudulent, unless the ship had been in the port from whence it had been obtained.' And, by another ordinance, two-thirds of the crew were required to be subjects of the neutral state. Some of the crew swore they were hired by *Englishmen*, and that both ship and cargo were *English*; that when the ship, which took them, came in sight, the captain sailed back towards the *English* coast: But one of the crew having informed him that the ship in sight carried *English* colours, he resumed his course.—Upon this case it was determined, that the decree of the court of appeal was conclusive to falsify the warranty.—Lord *Mansfield* said,—"The warranty meant that the ship was *Dutch, to the purpose of being protected*; and the sentence of the court of appeal in *France* is conclusive. The question then is, what the sentence means. The ship is condemned as not being *Dutch*. The warranty was, that she was *Dutch*, which was false. The law of nations is founded in eternal principles of justice.

justice.—But in every war the belligerent powers make particular regulations for themselves, which being no part of, or, perhaps, repugnant to the law of nations, do not bind other states: But other states, though not bound by them, must take notice of them for their own safety. In this case the insured warranted the ship to be *Dutch*, and they knew they must conform to the marine regulations of *France*. The insurers took the risk upon this warranty; but when it is sifted in the *French* courts, it turns out that she has not the requisites of a *Dutch* ship. She had not been in a *Dutch* port; and her sea-brief or passport was not in the form prescribed by the treaty of *Utrecht*; and appears to have been made on the oath of the captain. In fact she had none of the requisites of a *Dutch* ship. If the sentence had gone on a ground collateral to the property, the plaintiff would have been permitted to go into evidence to shew the truth of the warranty; and so it was holden in *Mayne* v. *Walter* (a): But this condemnation went on the ground that she was not completely documented, as a *Dutch* ship."

Neutrals ought, for their own safety, to take notice of the regulations made by the belligerents though repugnant to the law of nations.

The doctrines contained in the two foregoing cases seem, at first sight, to be rather at variance: But a little attention will shew that there is a material difference between the circumstances of each. In the latter, supposing the ship to have been *Dutch* property, the owner, if not bound to know the regulations made in *France* on the subject of *Dutch* ships, ought at least to have known what documents every *Dutch* ship was bound to have, by the treaty of *Utrecht*, to which the states of *Holland* were parties. And it must be taken as a rule, that the party warranting must be completely documented. Lord *Mansfield*, it is true, says that though other states are not bound by the particular regulations made by belligerent powers, against the law of nations, yet *they must take notice of them*, for their own safety; and from this expression it might be reasonably inferred that he was of opinion that the non-observance of these regulations would amount to a forfeiture of neutrality. But he expressly says, that the ground of the condemnation in that

The two last cases reconciled, and the result of both stated.

(a) Sup. 397.

case

case was, that the ship was not completely documented, as a *Dutch* ship, according to the treaty of *Utrecht*.—In the former case, there was no defect of documents: The only ground of the condemnation was the non-compliance with a *French* regulation, then lately made against the common rights of all nations. To this regulation the *Portugueze* were no parties; and the insured were not more likely to be informed of it than the underwriters—The result, however, of Lord *Mansfield*'s opinions delivered in both cases, seems to be, that when a belligerent makes particular marine regulations for its own benefit, affecting neutral states, but repugnant to the law of nations; there, though those neutral states are not obliged to observe them, yet, as it must be supposed that the power which made them, is determined, at all hazards, to enforce them, it is the duty of an insured, who warrants his ship or goods to be neutral property, if he has any knowledge of such regulations, to conform to them; in order to make himself a neutral '*to the* '*purpose of being protected*;' or at least to disclose to the underwriters his inability or disinclination to conform to them.—And if the insurer, on the other hand, has any knowledge of these regulations, he ought to warn the insured of his danger, and inform himself whether the insured means to conform to them. But if neither has any knowledge of them, a condemnation of a foreign court of admiralty, founded on the breach of them, will not prove a forfeiture of the warranty.

If the insurer knew of such regulations, he should apprise the insured of his danger. But if both are ignorant of them, a foreign sentence of condemnation for not conforming to them, will not be conclusive.

Some time after these decisions, a case (*a*) came before Lord *Kenyon* at *nisi prius*, in which he ruled that a sentence of condemnation, by a foreign court of admiralty, was conclusive against the warranty, though founded on the mere want of a document required by an ordinance which was not binding upon any neutral state. But this decision has been since overruled, and the learned judge himself afterwards candidly declared his disapprobation of it (*b*). As it cannot, therefore, be now considered as any authority, it is unnecessary to take any further notice of it in this place.

(*a*) *De Souza* v. *Ewer*, *P* 360.—(*b*) Vid. 8 T. R. 444, n.

Lord *Mansfield*, in the case of *Fernandes* v. *Da Costa*, seems to have thought that, where it does not appear on the face of the sentence, that the condemnation proceeded on the ground that the thing insured was enemy's property, other evidence might be resorted to, in order to have that ascertained. But in a subsequent case, it was determined that where a ship is condemned generally *as good prize*, the sentence alone is conclusive evidence that the property was not neutral, though no special ground appear on the face of it.

A sentence of condemnation generally *as good prize*, is conclusive, without stating any ground.

Thus:—Goods were insured on board the *Thetis*, a *Tuscan* ship, "*warranted neutral*."—The ship was taken and carried into *Spain*, and there condemned "*as good* "*and lawful prize*;" but the sentence stated *no ground* upon which it proceeded. This sentence was appealed from and reversed; but, upon a farther appeal, the latter sentence was reversed, and the former confirmed. Lord *Mansfield*, upon the trial, was of opinion that the sentence of the *Spanish* court of admiralty was conclusive evidence to falsify the warranty, and nonsuited the plaintiff.—This decision, upon a motion to set aside the nonsuit, was confirmed by the whole court.— Lord *Mansfield* said,—"The warranty is, that the goods are neutral. It must be presumed, from the condemnation, as no other cause appears, that it proceeded on the ground of their being *enemy's property*. In the case of *Bernardi* v. *Motteux* (*a*), the decision turned on the particular ground of the condemnation appearing on the face of the sentence, which shewed that it was not that of enemy's property; and for this reason the plaintiff was permitted to shew by evidence that the specific ground was really the cause of the condemnation. The counsel admitted the general rule, but at the trial said, that the special cause would appear upon the proceedings, if they could be had. The proceedings are now here, and shew that the question turned entirely upon the property of the goods; for the second court decreed that the goods were free, but the last court re-

Salucci v. *Woodmass*, B. R. Hil. 24 *G.* III. MS.

(*a*) Sup. 395.

verſed that decree. It is ſufficient, however, that no ſpecial ground is ſtated."

If the ſentence do not neceſſarily falſify the warranty, its truth may be proved.

Where the ſpecial grounds of condemnation ſet forth in the ſentence do not neceſſarily negative the warranty, the court may receive evidence to prove the truth of the warranty.

Calvert v. *Bovil*, 7 T. R. 523.

Goods warranted *American* were inſured from *London* to *Virginia*; and a foreign court, after reciting that the true deſtination of the ſhip was to the *Britiſh Weſt Indies*, having been hired and loaded at *London*, and having on board 80 barrels of gunpowder,' declares the ſhip and cargo good prize:—This is not concluſive againſt the warranty; and the court here may receive evidence to prove the truth of it.

Thus:—The goods and private adventure of the captain, warranted *American* property, were inſured on board the ſhip *Friends*, 'At and from *London* to *Virginia*.'—It appeared that the property of the goods was in the plaintiff who was an *American*; that the ſhip was *American* built, and manned by *American* ſailors; had been conſigned by the owners in *Virginia* to their correſpondents in *London*, upon the voyage inſured, having all neceſſary papers on board to ſhew that ſhe was an *American* ſhip; that the real place of her deſtination was *Norfolk* in *Virginia*, to which port ſhe belonged; that, in the courſe of her voyage, having met with tempeſtuous weather, and being much damaged, ſhe was obliged, from diſtreſs, to bear away to ſome port in the *Weſt Indies*; that in her courſe thither ſhe was captured by a *French* privateer, and carried into *Guadaloupe*, where ſhe was condemned by a ſentence of the court of commerce there, expreſſed, as to the matter in judgment, in theſe terms: 'Foraſmuch as the true deſtination of the ſaid veſſel was 'for the *Engliſh* iſlands, having been hired and loaded 'at *London*, and as there have been found on board 'her eighty barrels of gunpowder (*a*); the court declares 'the ſaid brig *Friends* a good prize for the benefit of the 'captors, together with her tackle, apparel, cargo, &c.'—The court determined, that this ſentence was not concluſive evidence to falſify the warranty; and that the plaintiff was entitled to recover.—Lord *Kenyon* ſaid,—"That the juſtice and honeſty of the caſe are with the plaintiff, is beyond all doubt; and that the ſhip was *American*, and the goods the property of an *American*, is equally clear. But it is contended, that though, in point of fact, this

(*a*) This was part of the captain's adventure, the reſt of the cargo conſiſting of ſlops, porter, cheeſe, and ſhip chandlery.

be true, yet the ſentence of condemnation precludes the plaintiff from aſſerting it. I yield to the caſes cited, which ſhew that, to a certain degree, this court will ſupport the proceedings of foreign courts by preſuming that their ſentences are juſt; and I will not make any exception, at preſent, of the proceedings of the *French* courts of admiralty. But when an attempt is made to pervert the juſtice of the caſe, it becomes neceſſary for us to ſee whether the deciſion of the court at *Guadaloupe* has ſo determined on the fact of neutrality, that we cannot examine into it. It has been ſaid, that nothing can juſtify the ſentence of the *French* court of admiralty, but the fact that this was *Britiſh* property. But that is a concluſion againſt all the facts proved in the caſe. If, indeed, that court had ſtated in their ſentence, that they condemned the goods, *becauſe* they were *Britiſh* property, I ſhould have conſidered myſelf bound by their ſentence. But they have, themſelves, aſſigned other reaſons for their adjudication. The expreſs grounds of the ſentence are, that the ſhip was deſtined for one of the *Weſt India* iſlands; that ſhe was hired and loaded at *London;* and that ſhe had a certain quantity of gunpowder on board; *therefore,* they condemned her and her cargo as good prize. Then it is impoſſible for us to conclude that the *French* court decided on the ground that this was *Britiſh* property, when all the evidence in the cauſe, and the reaſons expreſsly given by them for their judgment, lead to a contrary concluſion."—Mr. Juſtice *Lawrence* ſaid,—"The caſes alluded to in the argument ſeem to have eſtabliſhed this, that if it can be collected from the ſentence itſelf, on what ground the foreign court decided, that would be concluſive in any action brought in this country: But if it were ambiguous, or did not ſhew on the face of it, on what ground they proceeded, then the court here might receive evidence to ſhew what were the grounds of the deciſion abroad."

So great, however, in our courts, is the authority of the ſentence of a foreign court of admiralty, that if it be there decided that a ſhip or goods are *enemy's property*, ſuch ſentence, though manifeſtly unjuſt, will be received as concluſive evidence to diſprove the warranty.

But a condemnation, as *enemy's property*, is concluſive, though manifeſtly unjuſt.

 The

Geyer v. Aguilar, 7 T. R. 631.

A ship warranted *American*, is condemned as *enemy's property*, for not having on board a list of the crew, required by an ordinance of *France*, and adjudged to be requisite within the meaning of the treaty between *France* and *America*:—The sentence is conclusive against the warranty, though in fact the ship and cargo were *American* property.

Thus:—The freight of the ship *Rainbow* was insured, 'At 'and from *Charlestown* to *London*, *warranted American property*.'—In an action on this policy, brought to recover a loss by capture, it appeared that the plaintiff, who was an *American*, resident at *Charlestown*, was the sole owner of the ship, which took in a cargo at that place upon freight for the voyage to *London*; that she sailed on this voyage under the command of *William Smith*, a naturalized subject of the *United States*, and was captured by a *French* privateer, carried into *Nantz*, and there condemned and sold; that she had on board all necessary papers and documents, except a certified *role d'equipage* or list of her crew.—On the part of the defendant was produced a sentence of condemnation, by the commercial tribunal at *Nantz*, which, after stating at great length the mutual allegations of the parties, concludes to the following effect: 'Considering that the decree of the '*Executive Directory*, of the 12th *Ventose* last, declares 'lawful prize all *American* ships not having a list of 'their crews, conformably to the model annexed to the 'treaty of *February* 1778, between *France* and *America*, 'and that there was not on board the *Rainbow* such a list 'of the crew, but only a sea letter, on the back of which 'was an agreement subscribed by only seven of the crew; 'and that the captain produced only bills of lading with'out signature,—the tribunal therefore adjudges the vali'dity of the capture and confiscation of the ship and 'cargo, *the whole being, for want of captain Smith's having* '*the papers, in due form, decreed to belong to the enemies of* '*the republic*.'—The ordinance of *October* 1744 was produced, declaring all ships prize which should have on board any officer, a subject of the enemy's country; or which should not have on board a muster roll of the crew attested by the proper officer of the neutral port of departure. The treaty of *February* 1778, between *France* and the *United States* was also produced, the 12th, 25th, and 27th articles of which require that, when either power is at war, the ships of the other shall be obliged to carry passports, and certificates to shew that the goods on board are not contraband; also *a list of the crew*, containing their names, places of birth and abode.—It

was

was admitted that, previoufly to the capture of this and other fhips for want of the *role d'equipage*, no fuch roll had ever been deemed neceffary; but that, fince then, they have been in ufe.—The queftion, upon this cafe was, whether the fentence of condemnation, connected with the treaty and the *French* ordinances, were to be deemed conclufive againft the truth of the warranty. The court determined, that as the *French* court had concluded, from the evidence, that this was *enemy's property*, and as that judgment was binding upon the courts here, they were obliged to draw the fame conclufion; and that therefore, as the property warranted to be *American* property, muft now be taken not to have been fuch, the plaintiff could not recover.—Lord *Kenyon* faid, —" We come to decide this cafe bound and fhackled by certain rules from which we dare not depart. The acts of pirates are to be treated as the acts of pirates: They do not profefs to have any civil code of laws by which they are to be reftrained. But civilized nations profefs to be governed by certain rules; and the comity due from the courts in one country to thofe of another, induces them to give credit to each other's acts (*a*); and fo we muft continue to act in this country, until the legiflature fhall think fit to forbid it. I admit the cafes of *Mayne* v. *Walter* (*b*), and *Saloucci* v. *Johnfon* (*c*), up to their extent. I admit that, if a foreign court of admiralty proceed on grounds contrary to the law of nations, its judgments ought not to have weight in the courts of this country. But the ground on which the *French* court proceeded in this cafe was, that this was a capture of *enemy's property*; and it certainly is not contrary to the law of nations to condemn a fhip on that ground. Whether or not thofe courts arrived at that conclufion by proper means, I am not at liberty to enquire. Here the queftion is, whether they have not ftated, as the foundation of the condemnation, a ground which will not bear them out, fuppofing it to be true; and I am clearly fatisfied that they have. They concluded from the evidence that

(*a*) Vid. Sup. 391.—(*b*) Sup. 397.—(*c*) Sup. 387.

 this

this was enemy's property; not, indeed, in the formal language of our courts of juſtice, but they ſay, in ſubſtance, "We think this is enemy's property, and there- "fore we condemn the ſhip and cargo." Now that concludes this caſe; for as long as the foreign judgments are binding upon us, the concluſion that we muſt draw from the judgments of the *French* court, in this caſe, is, that the property which was warranted to be *American*, is found by thoſe judgments not to have been *American* property. I feel this, however, as the groſſeſt injuſtice towards the *Americans*. The *French* courts ſeem, in this inſtance, to have proceeded on *Algerine*, nay, on worſe principles; becauſe they profeſſed to have proceeded according to law, but in reality made the law a ſtalking-horſe for an act of piracy. But I cannot now queſtion the legality of their deciſion: I am bound to decide according to law. It is my duty *jus dicere, non jus dare.*"

The warranty is that the ſhip ſhall be neutral, *to the purpoſe of being protected.*

The meaning of the warranty is, that the ſhip or goods inſured ſhall be not only the *property* of neutral perſons, but alſo that they ſhall be neutral *to the purpoſe of being protected.* The ſhip muſt therefore be navigated according to the law of nations; and ſhe muſt be furniſhed with all the documents and papers which are the evidences of her neutrality, and of her obſervance of the regulations of particular treaties to which ſhe is bound to conform.

Documents requiſite for neutral ſhips.

It may be proper, in this place, to ſpecify the various documents and papers, which are generally expected to be found on board of every neutral ſhip: Theſe are, (*a*)

Paſſport, ſea-brief, or ſea-letter.

1. The Passport, Sea-brief, or Sea-letter.—This is a permiſſion from the neutral ſtate to the captain or maſter of the ſhip to proceed on the voyage propoſed; and uſually contains his name and reſidence, the name, property, deſcription, tonnage, and deſtination of the ſhip; the nature and quantity of the cargo, the place from whence it comes, and its deſtination; with ſuch other matters as the practice of the place requires.—This document is indiſpenſably neceſſary for the ſafety of every

(*a*) Vid. *Hubner de la ſaiſ. des bat. neut.* par. 2. ch. 3. § 10. vol. 1. p. 242.——(*b*) Ubi ſup.

neutral

neutral ſhip. *Hubner* (*a*) ſays, that it is the only paper which is rigorouſly inſiſted upon by the *Barbary* corſairs; by the production of which alone, their friends are protected from inſult.

Proofs of property.

2. THE PROOFS OF PROPERTY.—Theſe ought to ſhew that the ſhip really belongs to the ſubjects of a neutral ſtate. If ſhe appear to either belligerent to have been built in the enemy's country, proof is generally required that ſhe was purchaſed by the neutral before, or captured and legally condemned and ſold to the neutral after, the declaration of war; and in the latter caſe, the *bill of ſale*, properly authenticated, ought to be produced.—Even *Hubner* (*a*) admits, that theſe proofs are ſo eſſential to every neutral veſſel, for the prevention of frauds, that ſuch as ſail without them, will have no reaſon to complain if they are interrupted in their voyages, and their neutrality even diſputed.

Muſter Roll.

3. THE MUSTER ROLL.—This, which the *French* call *Role d'équipage*, contains the names, ages, quality, place of reſidence, and above all, *the place of birth*, of every perſon of the ſhip's company.—This document is of great uſe in aſcertaining a ſhip's neutrality. It muſt naturally excite a ſtrong ſuſpicion if the majority of the crew be found to conſiſt of foreigners; ſtill more if they be natives of the enemy's country.

Charter-party.

4. THE CHARTER-PARTY.—Where the ſhip is chartered, this inſtrument ſerves to authenticate many of the facts on which the proof of her neutrality muſt reſt, and ſhould therefore be always found on board chartered ſhips.

Bills of lading.

5. THE BILLS OF LADING.—By theſe the captain acknowleges the receipt of the goods ſpecified therein, and promiſes to deliver them to the conſignee or his order. Of this there are uſually ſeveral duplicates; one of which is kept by the captain, one by the ſhipper of the goods, and one tranſmitted to the conſignee.—This inſtrument, being only the evidence of a private tranſaction between the owner of the goods and the captain,

(*a*) Ubi ſup.

does not carry with it the same degree of authenticity as the charter-party.

Invoices.

6. THE INVOICES.—These contain the particulars and prices of each parcel of goods, with the amount of the freight, duties, and other charges thereon, which are usually transmitted from the shippers to their factors or consignees.—These invoices prove by whom the goods were shipped, and to whom consigned. They carry with them, however, but little authenticity, being easily fabricated where fraud is intended.

Log-book.

7. THE LOG-BOOK, or ship's journal.—This contains a minute account of the ship's course, with a short history of every occurrence during the voyage.—If this be faithfully kept, it will throw great light on the question of neutrality; if it be in any respect fabricated, the fraud may in general be easily detected.

Bill of health.

8. THE BILL OF HEALTH.—This is a certificate properly authenticated, that the ship comes from a place where no contagious distemper prevails, and that none of the crew, at the time of her departure, were infected with any such distemper.—It is generally found on board of ships coming from the *Levant*, or from the coast of *Barbary*, where the plague so frequently prevails.

But the want of any of these is only presumptive evidence against neutrality.

Upon the subject of the ship's documents, it is to be observed that, though, by the law of nations, the want of some of these papers may be taken as strong *presumptive evidence*; yet, the want of none of them amounts to *conclusive evidence* against a ship's neutrality.

A ship warranted neutral must be navigated according to the treaties by which she is bound.

It has already been said, that a ship warranted neutral, must be neutral *to the purpose of being protected*; she must therefore be navigated, not only according to the law of nations, but also in conformity to the particular treaties subsisting between the country to which she belongs and each of the belligerent states. A ship warranted neutral must therefore, in order to fulfil the warranty, not only belong to the subjects of some neutral state, but also have all the requisites to entitle her to the privileges and immunities of ships belonging to that state. The want of any of these, *for any part of the voyage insured*, though it only

subject

subject the ship to *search and detention*, will discharge the insurer.

Thus:—An insurance was made on the ship *Atlantic*, 'At and from *London* to *Guernsey*, from thence to the coast 'of *Africa*, during her stay and trade there, and at and 'from thence to her port or ports of discharge in all or 'any of the *British West India islands* and *America*; the 'ship and goods on board warranted *American* property.' —In an action on this policy to recover a loss by capture, it appeared, that the *Atlantic* was an *American* ship, the property of the plaintiff, a native and citizen of the *United States*, and that the goods on board were *American* property; that, by the treaty of 1778, between *France* and the *United States*, it was agreed, 'That 'the ships and vessels belonging to the subjects of either 'ally, should be furnished with sea letters or passports, 'in a form prescribed, expressing the name, property, 'and bulk of the ship, and the name and place of habi-'tation of the master; and that, if the ships of the sub-'jects of either ally should be met with at sea by the 'ships of war of the other, such ships of war, for the 'avoiding of any disorder, should remain out of cannon 'shot, and might send their boats on board the neutral 'merchant ship, to the number of two or three men only, 'to whom the master of such ship should exhibit his 'passport; and that such ship, on shewing such passport, 'should be at liberty to pursue her voyage, so as it should 'not be lawful to molest, search, or give chase to her, 'or force her to quit her intended course.' That when the ship sailed from *London* for *Guernsey*, this country was at war with *France*; but she had not then on board any passport, made out according to the form prescribed by the treaty; but that when she sailed from *Guernsey*, and until her capture, she had such passport on board, which was exhibited to the captain of the privateer at the time of her capture.—The only question was, whether the warranty, *that the ship and goods were American property*, had been complied with.—The court were clearly of opinion that it was not complied with; and therefore, that the plaintiff was not entitled to recover.—Lord *Kenyon* said,—

Rich v. *Parker*, 7 T. R 705. S. C. 2 *Esp* Rep. 615.

A ship insured from *A.* to *B.* and from thence to *C.* and *D.*, warranted *American* property, sails from *A.* to *B.* without the passport required by the treaty between *France* and *America*. At *B.* she procures such a passport, but is afterwards captured by the *French* on her passage to *C.*:—The insured cannot recover for this loss; though at the time of the capture, the proper passport was on board, and though the ship ought not to have been condemned by the *French* as prize; because she did not *fail* with all requisites to entitle her to the privileges of an *American* ship.

"Nothing

If a ship insured be not in a proper condition for sailing, during only *a part of the voyage*, nothing that happens afterwards can better her original situation.

"Nothing can be clearer than this, that if a ship insured be not sea-worthy, or in a proper condition for sailing, *during any part of the voyage*, nothing that happens afterwards can better her original situation. By the treaty between *France* and *America*, it is agreed that the ships and vessels belonging to the subjects of either ally must be furnished with sea-letters or passports. Now I think the warranty in this policy, that the ship was *American* property, is not satisfied merely by shewing that in fact she was *American property*. When these parties entered into the contract of insurance, the underwriter was to be indemnified to a certain extent under this warranty. The ship was not only not to be liable to risks arising from her not being *American* property, but she was not to be liable to any inconvenience or impediment in her voyage, from her not being in the condition required by the treaty with *France*. The question here is, whether or not this ship was in such a situation as to be entitled to all the privileges of an *American* flag: I think she was not. It is true, perhaps, that the *French* had no right to confiscate the ship for not having the passport on board, if in fact it were proved that she was an *American* ship. But, under the terms of this treaty, the *French* had a right to do certain acts which they could not have done, according to the treaty, if the passport had been on board; for then the *French* ships were not to come within cannon shot, nor to chase or drive her out of her course; and they were not to send more than two or three men on board. This negative implies an affirmative, that in case she had no passport on board, the *French* would have been guilty of no infraction of the treaty, if they had forced this ship out of her course. By this contract it is intended that the underwriter should not be liable to such risks: But the ship was in fact subject to these risks and inconveniences through the neglect of the insured, because he did not do all that was required by the treaty. Might not this ship have been carried into a *French* port, and the voyage thereby delayed for want of this passport, though, perhaps, ultimately she would not have been liable to confiscation? And is not that a greater risk than the underwriter

If a ship, for want of a necessary document, subject herself to detention, she forfeits her neutrality.

derwriter engaged to insure against, in the case of a ship warranted *American?* It is true that the loss did not happen in consequence of the ship's not having a passport, but still the underwriter was put to greater risk than he would have been put to, if the ship had had this document on board."—Mr. Justice *Ashurst* said,—"The warranty that the ship was *American* does not merely mean that she was *American*-built, but that she was entitled to all the privileges and immunities of an *American* ship, otherwise it makes a difference in the value of the risk; and, to entitle her to these privileges, she ought to have had a passport; and if the underwriter had been informed that she could not have one on board, in the first part of the voyage from *London* to *Guernsey*, perhaps he would not have insured for the same premium. —Mr. Justice *Grose* thought the principle established in the cases of *De Hahn* v. *Hartley* (*a*), and *Barzillay* v. *Lewis* (*b*) must decide this.—Mr. Justice *Lawrence* said, —"The finding of the jury, "that the ship was *American* "property," did not amount to a finding that the warranty had been *complied with*. If the meaning of the warranty was, that the ship was entitled to all the privileges of an *American* flag, which I think the fair construction of the policy, then the warranty has not been complied with."

A warranty that a ship is neutral does not merely mean that she was built in the neutral state, but that she is entitled to all the immunities of the ships of that state.

But though the sentence of a foreign court of admiralty possess such great authority in our courts, that it is constantly received as conclusive evidence, as to the points which it professes to decide, yet it must be observed that its authority is confined to those points alone; and nothing but the matters *expressly decided* can be taken as incontrovertible. A fact, therefore, *recited* in such sentence, though it be a part of the premises on which the adjudication is founded, is not considered as *adjudged*, and therefore not conclusive.

The sentence is only conclusive as to the points, which it professes to decide.

Thus:—Goods were insured on board the *Mercury*; 'from *Virginia* to *Bremen*.'—In an action on the policy

Christie v. *Secretan*, 8 T. R. 192.

Goods are insured on board an *American* ship, but which is not warranted,

(*a*) Sup. 348.——(*b*) Sup. 398.

to

as such. The ship is captured by the *French*, and the sentence, premising that her papers were defective and irregular, and not conformable to treaty, concludes that on this account she is looked upon as belonging to the enemies of the *French* republic: As the ship is not *adjudged* to be deficient in the proper documents, but only that she belonged to the enemies of the republic; this is not conclusive to prove that she was not properly navigated.

to recover a loss by capture, it apppeared that the *Mercury* was an *American* ship; but no warranty was made to any of the underwriters on the subject: On the contrary, the broker, though he spoke of the ship as an *American*, told the underwriters that he was directed not to warrant any thing; that the ship had on board, however, at the time of the capture, all such papers and documents as are usually carried on board *American* ships, or which the *French* themselves deemed necessary in former voyages. She had a muster roll, but not signed or certified by any public officer of the place from which she sailed. The ship being carried into *Nantz*, was there condemned by the *Commercial Tribunal* in the following sentence: 'Considering that the 4th article of the 3d *Brumaire*, 4th 'year, declares good prize, all *American* ships which 'shall not have on board a muster-roll in the form annexed to the treaty of the 6th of *February* 1778, and 'that the muster-roll of the *Mercury* is not conformable to that, or to the forms prescribed by the decree 'of the *Directory* of the 12th *Ventose*, 4th year, being 'neither dated or signed by any public officer of the '*United States*: Considering that the bill of lading of '255 hogsheads of tobacco found on board, was not 'signed by the captain, contrary to the 9th article of 'the *Marine Ordinances*, whereby it is declared that all 'vessels on board whereof no charter-party, bills of 'lading, or invoices, are found, shall be decreed good 'prize, together with their cargoes; as also the 9th article 'of the ordinances of 1744, declaring all bills of lading 'not signed null and void: Considering that there were 'other goods on board, of which there were no bills of 'lading or invoice; that the captain has produced no '*American* protection, and that he is an *Irishman*, and has 'a wife and children in *Ireland*; the tribunal adjudges 'and declares the validity of the prize of the ship *Mercury*, and the goods on board, *for want of the dispatches and sea-papers of the captain being in regular order*; *on which account*, she is *looked upon* as belonging to the enemies of the *French* republic.'—On the part of the defendant it was contended that there was an implied warranty in every contract of insurance, that the ship

should

ſhould be navigated according to the laws of the country to which ſhe belonged, and to which ſhe was going (*a*); that though there was no warranty that this was an *American* ſhip, yet that, being in fact *American*, ſhe ought to have been documented as ſuch, and that for the want of the muſter-roll properly ſigned, as required by the above treaty, ſhe was condemned (*b*).—But the court determined that the plaintiff was entitled to recover.—Lord *Kenyon* ſaid,—" In deciding this caſe, I do not mean to deny that the ſhip muſt be navigated, not only according to the law of nations, but alſo according to the particular treaties that ſubſiſt between the country to which ſhe belongs, and other countries. The ſhort ground of my opinion is, that the ſentence of a court of admiralty is only concluſive on the points which it profeſſes to decide; and the only queſtion here is, what point the court of admiralty has decided? Now the ſentence recites many facts into which it is not neceſſary to enquire; but the ſole reaſon given for the adjudication at the concluding part, does not affect the caſe before us. The condemnation is expreſſed to be, not becauſe the ſhip had not the proper documents on board, but becauſe ſhe belonged to the enemies of the *French* republic. But that does not releaſe the underwriters from their reſponſibility. If there had been a warranty that the ſhip was *American* (*c*), this ſentence would have falſified it."

In the following caſe, which was decided upon great conſideration, and upon a review of all the former authorities on this point, the line has been ably and accurately drawn between thoſe ſentences of foreign courts of admiralty, which muſt be taken to be concluſive againſt the warranty, and thoſe which are not ſo, but leave the queſtion of neutrality open for diſcuſſion in our courts.

An inſurance was made on goods on board the ſhip *Juliana*, 'warranted a *Dane*,' at and from *London* to *Teneriffe*.

Pollard v. Bell, 8 T. R. 343.

A ſhip warranted *Daniſh* is condemned becauſe the captain was an '*enemy*.'—This ſentence not being founded on the ground that the ſhip was

(*a*) Vid. *Law* v. *Hollingworth*, 7 T. R. 687, ſup. 165, and *Farmer* v. *Legg*, 7 T. R. 186, ſup. 178.——(*b*) Vid. ſup 385, and *Lothian* v. *Henderſon*, inf.——(*c*) It is now holden that merely *repreſenting* the thing inſured as belonging to the ſubjects of a neutral ſtate, is, of itſelf, equivalent to a warranty. Vid. *Lothian* v. *Henderſon*, *Pul.* 3 & *Rel.* 499, inf.

not a ship, but only because she had been navigated contrary to a *French* ordinance, does not falsify the warranty.

Teneriffe.—In an action on this policy to recover for a loss by capture, it appeared that the *Juliana was a* Danish *ship, the property of* Danish *subjects;* that she sailed from *Copenhagen* to *London*, and there took on board the goods on which the insurance was made; that from thence she sailed on the voyage insured, was captured by a *French* privateer, and carried into *Bourdeaux*, having then on board every document usually carried by *Danish* ships; that the master was a native of *Scotland*, not naturalized in *Denmark*; but, that, on the 6th of *October* 1794, posterior to the war between *England* and *France*, he obtained letters of burghership in *Denmark*, but had no domicil there; that the ship and cargo were condemned as prize by the tribunal of commerce of *Bourdeaux*, and this sentence was confirmed, upon appeal, by the civil tribunal of *La Gironde.* In these two sentences were recited several *French* ordinances, particularly one in 1778, by which it is declared that all ships shall be confiscated, "wherever there shall be found "on board a supercargo, merchant, commissary, or *chief* "*officer*, being an enemy;" and it appeared that the ship was ultimately condemned for a violation of that ordinance, the captain being a *Scotchman.* Upon appeal to the supreme tribunal of cassation at *Paris*, the former sentences were confirmed, upon the ground that the master was born in *Scotland*, and an enemy; and that, as his denization in a neutral country was not justified according to law, *his quality of enemy sufficed to legitimate the prize*, and he was condemned to pay a fine of 150 franks.—The court were unanimously of opinion, that the warranty was not falsified by these sentences, and that the plaintiffs were entitled to recover.—Lord *Kenyon* said,—"It is true that the meaning of the warranty was not merely that the ship was *Danish* built, but that she should be circumstanced during the voyage as a *Danish* ship ought to be. This is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by courts of admiralty in *France* during this war, which have all proceeded on a system of plunder. But still, until the legislature interferes on this subject, we, sitting in a court of law, are bound to give credit to the sentences of courts of competent jurisdiction.

Though the sentence of a foreign court of admiralty be founded on a system of plunder, yet our courts are bound to give credit to them.

tion. If, therefore, in this inſtance, the *French* courts had condemned this ſhip, on the ground that ſhe was not *Daniſh* property, we ſhould have been concluded by that ſentence in this action, and muſt, however reluctantly, have given judgment for the defendant. This is proved by the different authorities, and ſupported by reaſon. The courts of admiralty profeſs to proceed on the law of nations, and ſuch treaties as particular ſtates have agreed ſhall be ingrafted on that law. But I concur with Lord *Mansfield* in opinion, that it is not competent to any indidual ſtate to add to the law of nations by its own arbitrary ordinances, without the concurrence of other ſtates (*a*). That is the ground on which this caſe muſt be decided. Now let us ſee what was the foundation of the condemation in the *French* courts? It is ſtated in one of the ſentences, that, by their own ordinances, all ſhips are to be confiſcated, whenſoever on board theſe ſhips "ſhall be found a ſupercargo, merchant, commiſſary, or "chief officer, being an enemy." But I ſay that they had no right, by making ſuch an ordinance, to bind other nations. Then, was the ſhip in queſtion condemned on the ground that ſhe was not *Daniſh* property? Certainly not. It appears clear beyond all doubt that ſhe was at leaſt condemned on the ground that the captain was one of thoſe perſons whom by their own ordinances only they wiſhed to proſcribe. This caſe cannot be diſtinguiſhed from that of *Mayne* v. *Walter* (*b*); though, even without the authority of that caſe, I ſhould have had no heſitation in deciding in favour of the plaintiff. On the whole, therefore, I am of opinion, that though we ſhould have been concluded by that ſentence, if the ſhip, contrary to juſtice, had been condemned as not being *Daniſh*; yet, as the courts abroad have endeavoured to give other ſupports to their judgment, which do not warrant it, and have ſtated, as the foundation of the ſentence of condemnation, one of their own ordinances which is not binding on other nations, this ſentence does not prove that the ſhip in queſtion

(*a*) Vid. *Bird* v. *Appleton*, 8 T. R. 562.——(*b*) Sup. 397.

was

was not a neutral ſhip; and conſequently the plaintiff is entitled to recover."—Mr. Juſtice *Lawrence* ſaid—" There are two queſtions in this caſe; *firſt*, what is the ground of the ſentence of condemnation; *ſecondly*, whether it falſifies the warranty; for if it do, then, according to all the authorities, it is concluſive here.—On the firſt queſtion, the only ground of the ſentence was, that the captain of the ſhip was born in *Scotland* and an enemy; for they ſay, " that his quality of enemy ſufficed to legitimate the prize;" and this, merely becauſe it is againſt one of their own ordinances.—The next queſtion is, whether this has negatived the warranty. This warranty did not imply any neceſſity to comply with the peculiar regulations of the belligerent powers. For, the general rule for judging and deciding whether a captured ſhip be neutral or not, is the law of nations, ſubject to ſuch alterations and modifications as may have been introduced by treaties: But where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all queſtions, on matters of prize. This is clearly laid down in the ſtate paper ſigned by Sir *George Lee*, Dr. *Paul*, the King's advocate, Sir *D. Ryder*, and Mr. *Murray*, then Attorney and Solicitor General, in anſwer to the *Pruſſian* memorials, concerning neutral ſhips (*a*). When, therefore, a ſtate in amity with a belligerent power has, *by treaty*, agreed that the ſhips of their ſubjects ſhall only have that character when furniſhed with certain preciſe documents, whoever warrants a ſhip to be the property of ſuch ſubject, ſhould provide himſelf with thoſe evidences which have, by the country to which ſhe belongs, been agreed to be the neceſſary proof of that character. In requiring this, no difficulty is impoſed, of which the inſured is not aware, and which may not be in his power to prevent: But to inſiſt on his furniſhing himſelf with every document the belligerent powers may require, and to inſiſt that the

Ships ſhould be furniſhed with ſuch documents as the ſtates they belong to have by treaty agreed to be the evidences of their neutrality.

with, unleſs the ſhip be navi-

gated

gated according to their ordinances and regulations, would be to deprive the insured of his indemnity for the want of papers, &c. of the necessity of which he may fairly be presumed to be ignorant, and which papers it may not, perhaps, be in his power to procure; for how can the officers of one country be called upon to grant that which the laws of that country do not require? These *French* decrees are regulations made with some view to the laws of *France*, but are not applicable to the subjects of any other country. In examining the cases decided on this point, it will be found to have been settled in many of them, that a condemnation on the particular ordinances of a belligerent power does not falsify a warranty of neutrality. In the case of *Bernardi* v. *Mettam* (*a*), the ship *Joanna* was warranted neutral; the only doubt was, whether she had been condemned as being the property of an enemy, or for violating a *French arrêt*, by throwing papers overboard; for the one or the other of these causes she was condemned. If she had been condemned for the first, namely, that she was not neutral, the plaintiff clearly could not have recovered, nor could he have recovered if she had been condemned on the other ground, according to the argument of the defendant in this case: But it is clear that the court did not, in that case, proceed upon the argument used for the defendant in the present case, because the plaintiff did recover in that case, it not being certain that the ground of condemnation was, that the ship was the property of an enemy. But the case chiefly relied on by the defendant here is that of *Barzillay* v. *Lewis* (*b*), which was decided on the ground of a non-compliance with the treaty of *Utrecht*, and on the sentence having condemned the ship as *English*. According to a manuscript note of that case, taken by Mr. Justice *Buller*, rather more full than that in print, Lord *Mansfield* began his judgment by stating the sentence of the court of admiralty as being conclusive, and that the question was on the meaning of it. He afterwards observed, that

Bernardi v. *Mettam*, considered.

Barzillay v. *Lewis* considered, and illustrated.

(*a*) *Doug.* 375, sup. 395.——(*b*) *Park* 410, sup. 398.

 the

the ſhip was inſured by her *Dutch* name, and that the underwriters took it for granted that ſhe was *Dutch*; but that, when this was ſifted in *France*, ſhe appeared to have none of the requiſites to ſhew that ſhe was neutral property, for ſhe had never been in a *Dutch* port, and the ſea brief was *not conformable to the treaty of Utrecht*; and he concluded by ſaying that the ſhip was condemned *as an Engliſh ſhip*, and that it was not open to this court to enquire whether that ſentence were right or wrong. So here, if the ſhip had been condemned as an *Engliſh*, and not a *Daniſh* ſhip, we ſhould have been concluded by it. In that caſe Mr. Juſtice *Willes* and Mr. Juſtice *Aſhurſt* concurred; and Mr. Juſtice *Buller* ſaid, "The firſt ſentence ſeems to be on particular *arrêts*. The ſecond appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muſter-roll or ſituation of the crew as to their being more than two thirds *Engliſh*. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; *for if ſhe were not ſo documented* as to have the protection of a neutral ſhip, the warranty is not complied with. It is true that Lord *Mansfield*, in the courſe of giving his opinion in that caſe, uſed ſome expreſſions which may be applied to ſupport the defendant's argument here; but it is clear that the ground on which he decided was a non-compliance with what was agreed, by the treaty of *Utrecht*, ſhould be a neceſſary document to prove the ſhip to be *Dutch* property; and this was the expreſs ground of the opinions of the other judges. That Lord *Mansfield* could not, in that caſe, intend to ſay that a non-compliance with the ordinances of *France*, not adopted by any treaty, was a forfeiture of neutrality, appears from the caſe of *Mayne* v. *Walter*, where the plaintiff recovered (a).—He there pointedly ſhewed how ſuch ordinances might become binding, by obſerving that the *whole caſe turned upon treaties between France and Portugal*, about which both parties were ſilent; and there it was holden that the

Mayne v. *Walter* conſidered.

(a) Sup. 397.

 cumſtance

circumſtance of having an *Engliſh* ſupercargo on board was no ground to defeat the plaintiff's right to recover on a policy on a ſhip warranted to be *Portugueze*. In a ſubſequent caſe, *Saloucci* v. *Johnſon* (*a*), there were two grounds of condemnation, one that the ſhip would not ſtop to be ſearched, the other, that ſhe had not a charter-party on board, as required by an ordinance of *Spain*. On the latter, Mr. J. *Aſhurſt* ſaid (according to my own note),—'As to the next queſtion, her not having a 'charter party: This clearly is not required by the law 'of nations; and it appears by the caſe that ſhe was a 'general ſhip. And though ſhe acted contrary to a par-'ticular ordinance of *Spain, other nations are not bound* '*to take notice of ſuch ordinance, unleſs in virtue of ſome* '*treaty ſubſiſting between two ſtates, by which they ſubmit* '*to be bound by it.* That is not the caſe here.' So that the doctrine on which the caſe before us is determined was diſtinctly recognized there. The argument of the defendant here is, that the ſentence of condemnation is concluſive, on the point that the ſhip was not navigated according to the contract between the parties.—The contract between the parties is, that ſhe was a neutral ſhip; but the ſentence has not decided that point; it has only decided that ſhe was not navigated according to an ordinance of *France*, but that was no part of the plaintiff's contract. In deciding this caſe in favour of the plaintiff, we do not take upon ourſelves to ſay that the ſentence of the *French* court of admiralty is erroneous: All that we determine is, that the *French* court has not decided that which would falſify the warranty of neutrality."

Saloucci v. *Johnſon* conſidered.

In the caſe of *Bird* v. *Appleton*, which came before the court of King's Bench, ſoon after the above caſe, and which has been already fully ſtated (*b*), Lord *Kenyon* declared that he adhered to the opinion delivered by the court in the above caſe of *Pollard* v. *Bell*; and maintained, as an indiſputable propoſition, that courts of admiralty are to

Courts of admiralty are to proceed on the *jus gentium*, which is not varied by particular treaties, except as between the parties to ſuch treaties.

(*a*) Sup. 387.——(*b*) Sup. 74.

 proceed

proceed on the known *jus gentium*, or on the treaties between particular states; that such treaties do not alter the *jus gentium* with respect to the rest of the world; but that, as between those particular states, they are considered as ingrafted on the *jus gentium*; and that one state has no authority, by any ordinance of its own, to vary the general law of nations, as to other states.

A condemnation for want of a document, not required by the law of nations, or by treaty, is not conclusive.

In the foregoing case of *Pollard* v. *Bell*, there was an express warranty that the ship was neutral. In the following case there was no such warranty expressed; but it appearing in evidence that the ship was in fact neutral, it was determined that, upon a loss by capture by a *French* privateer, the insured was entitled to recover upon a policy upon the ship and goods, notwithstanding a sentence of condemnation thereof as prize by the *French* court of admiralty, such sentence proceeding on the ground of a breach of *French* ordinances, requiring the observance of certain particulars in respect of the ship's documents, beyond what was necessary by the treaty.

Price & anr. v. *Bell*, 1 *East* 663. —An *American* ship being furnished with such a passport and other papers as are required by treaty, is condemned by the *French*, on the ground of a breach of *French* ordinances, contrary to the treaty:—This sentence does not falsify any supposed implied warranty that the ship should be furnished with *American* papers.

That was an insurance on the ship *South Carolina* and goods on board, "from *London* to *Charlestown*." It appeared that the ship was *American*; but there was no warranty of her being such; that on the 30th of *January* 1797, the captain, being about to sail on a voyage from *Charlestown* for the *Havannah*, obtained the usual and regular sea-letters or passports in *English*, *French*, and *Dutch*; that in *May* 1797, the ship returned from the *Havannah*, and deposited her passports with her other sea-papers at the custom-house at *Charlestown*; that on the 27th of *May*, being then about to sail again from *Charlestown* for the *Havnanah*, and from thence for *London*, the captain received back from the custom-house at *Charlestown* his passports, with a certificate indorsed thereon, stating that he had, that day, cleared out for the *Havannah* with the goods specified in the indorsement, and at the same time took all other documents and papers usually taken, or made entry of, by *American* ships. That the ship sailed to the *Havannah*, and from thence to *London*, where she arrived in *September* 1797; that at *London* she took in a cargo (the goods insured)

insured) for *Charlestown*; and the captain, having lost several of his crew by death, was obliged to take others on board, all of whom were *American* subjects, and procured a new muster-roll, upon oath made before the lord mayor of *London*, and signed and certified by the *American* minister, with whom he left the original muster-roll; that on the 11th of *December* 1797, the ship sailed on the voyage insured, and on the 28th was captured by the *French* and carried into *L'Orient*; that at the time of the capture, she had on board, *beside all other usual papers and documents*, the passports indorsed as above stated, and also the muster-roll obtained in *London*; that the ship and cargo were condemned by the tribunal of commerce at *L'Orient*; and upon appeal, the sentence was confirmed; that the original sentence admitted that the ship was *American*; but, in substance, alledged as the ground of the condemnation, that the passport had been used for several voyages, contrary to an ordinance of 1778, which provides that "*a passport shall serve but for one voyage only*;" that the muster-roll obtained in *London* was insufficient, because, by the same ordinance, "*the muster-roll must be* "*attested by the officers of the neutral place from whence the* "*vessel sails*;" that the bills of lading do not prove the neutrality of the goods, within the provisions of the said ordinance; that the court of appeal, after adopting these allegations, added, that if all these provisions should not be sufficient, of themselves, to establish the former sentence, yet that the law of the 12th *Nivose*, 6th year, declaring, "*that the neutrality of every ship should be determined by the cargo*," was sufficient to establish it, because the ship was within the scope of this law, her cargo being entirely of goods of *English manufacture*; that the treaty between *France* and the *United States* (art. 12.) provides, "that the merchant ships of either party "going into the port of an enemy of the other, shall, "upon just grounds of suspicion, produce not only their "passports, but likewise certificates shewing that their "goods are not prohibited as contraband;" and that art. 25. provides that, "if either party shall be at war, the ships of

'of the other must be furnished with passports in a form 'annexed to the treaty; *and which shall be recalled every 'year, if the ship returns within the year.'*—Upon this case three questions arose; 1st, Whether there was an *implied warranty* that the ship should be furnished with all papers and documents which an *American* ought to have? 2dly, Whether, in fact, this ship had all such papers? 3dly, Whether the condemnation proceeded on the ground that she had not such papers as, by treaty, or by the law of her own country, she ought to have had? or, Whether it proceeded on the want of such papers as the ordinances of *France* only require?—The court determined in favour of the plaintiffs.—They declared that the opinion which they had formed on the two last of these questions, rendered it unnecessary to give any opinion upon the first. They said, that it appeared that this ship had all the papers necessary for an *American* vessel, which, put an end o the defence set up by the underwriters; that the sentences of condemnation appeared to them manifestly to have proceeded on the ground of a breach of *French* ordinances which were contrary to the treaty; particularly, the ordinance of *July* 1778, which declares that a passport shall serve but for one voyage; whereas, by the treaty, passports are to be recalled only every year; and then only in case the ship returns into her port within the year. And that, in this case, the passport which the *South Carolina* had on board at the time of the capture, had been granted within the year; for it was granted on the 30th of *January* 1797, and the ship was captured in *December* 1797. So that, if there were any such implied warranty as had been contended for, it was not negatived by the condemnation.

But if, from the whole of the sentence, it can be collected that the foreign court proceeded on the ground of enemy's property, it is conclusive.

Though the foreign court, in pronouncing sentence, do not expressly declare that the subject of condemnation was *enemy's property*; yet, if, from the whole of the sentence, it can be collected that it proceeded on that ground, it will falsify the warranty. This was determined at the

Cockpit,

Cockpit, upon great conſideration, in the following caſe, by Sir *William Grant*, Maſter of the Rolls, Lord *Glenbervie*, and Sir *William Scott*, Judge of the Admiralty, upon appeal from a judgment of the Recorder's Court at *Madras*.

Kindersley & ors. v. *Chap.* & ors. at the *Cockpit*, 22d *July* 1801. MS.

A ſhip, warranted *Swediſh*, is captured by the *French*, and condemned. The court of prize, after ſtating the principal queſtion to be whether the ſhip and cargo were *enemy's property*, condemns both as *good prize*, without any expreſs adjudication as to the *property*:—This ſentence muſt be taken to have proceeded on the ground of *enemy's property*, and is concluſive to falſify the warranty.

It was an inſurance effected at *Madras*, on goods on board the *Reſolution*, Captain *Neale*, on a voyage from *Madras* to *Sweden*, "*warranted* Swediſh *property*"—The ſhip, being obliged to put into the *Iſle of France* for refreſhments, was there ſeized, and, with her cargo, condemned as prize.—The ſentence of the *tribunal of commerce*, at that place, ſtated two queſtions for deciſion. 1ſt, 'Whether the proceedings were regular? 2dly, 'Whether from the papers found on board, and other 'evidence, the ſhip and cargo muſt be conſidered as '*enemy's property*, and confiſcated for the uſe of the 'republic; or, whether they muſt be conſidered as '*Swediſh* property, and reſtored to the claimants.' It then proceeds to ſtate ſeveral grounds of condemnation, and amongſt others, 'That the maſter was an *Engliſhman* 'by birth, who claimed to be a naturalized *Swede*, but 'whoſe naturalization was not conformable to the regu'lations of *France* in 1778; that Mr. *Gordon*, the ſecond 'captain, or chief mate, was a *Scotchman*, which was 'contrary to the ſame regulations; that the general invoice 'and bill of lading produced by the captain, and the parti'cular invoice of the cargo, made by the ſhippers at *Madras*, 'were not ſigned,' &c.; whereupon the court declares the ſhip and cargo to be *lawful prize*.—An action on the policy was brought in the Recorder's Court at *Madras*, where judgment was given for the underwriters, on the ground that the Admiralty Court at the *Iſle of France* had conſidered the queſtion, whether the property was enemy's or neutral, and had condemned it as enemy's; and that this was ſufficient to falſify the warranty.—Upon appeal to the king in council, this judgment was affirmed.—Sir *William Grant*, who pronounced the judgment, ſaid:—"With regard to one queſtion that has been

A sentence of a court of admiralty, proceeding *in rem*, is conclusive, and binds in all courts and all persons.

been started in the argument, namely, whether a sentence of a court of admiralty can, in a court of common law, be held to falsify a warranty, so as to affect the interest of one who was no party to the suit in the admiralty; I think that this objection, not having been made in the court below, cannot now be made here. But supposing it now open to the appellants to raise that question, I think it must here be raised in vain. It is quite clear that, from Lord *Hale's* time to the present period, it has been settled that a sentence of condemnation in a court of admiralty, as enemy's property, is conclusive to prove that the property was such, not only for the immediate purpose of such a sentence, but it is binding in all courts and as against all persons. This has been so clearly understood that it was not even controverted in the case of the Duchess of *Kingston*, where the conclusive effect of all sorts of evidence was so ably discussed (a). It was admitted that the sentence of a court of admiralty proceeding *in rem* must bind all parties,—must bind all the world (b). But, taking such a sentence to be conclusive, another question is made,—whether *this sentence* ought to produce that effect? It is said that if it clearly appears on the face of the sentence, that it did not proceed on the ground of enemy's property, but on some other distinct ground, in that case, the warranty of neutrality is not necessarily falsified by it, and certainly there are several cases that have so decided. I have looked at them all, and not one of them will be contradicted by our decision on this case. It is generally to be presumed that

(a) See Lord *Kenyon's* judgement in *Christie* vs *Secretan*, 8 T. R. 196. All the learning upon this point will be found in the arguments of Mr. *Wallace* and Mr. *Mansfield* in the Duchess of *Kingston's* case, 11 *Harg.* State Trials, 205, and in the admirable argument of Lord Chief Justice *De Grey* in the same case, p. 261.—Vid. also *Walker* vs *Witter*, *Dougl.* 1. and the notes there to the 3d edition, and 12 *Vin. Ab.* 86.

(b) Vid. sup. 392. where it is shewn that in *France*, at least, the converse of the rule here insisted upon has always prevailed.

such

such sentences proceed on legitimate grounds, and therefore they are in general conclusive proof to negative the warranty. Hence it follows that it does not lie on the party producing the sentence to shew that it has proceeded on the ground of enemy's property; but it is incumbent on the other party, who objects to the sentence, to shew that it proceeded on some other ground. This, I take to be the effect of those decisions; and therefore it is necessary here to shew some distinct and collateral ground on which the sentence has proceeded, leaving the question of property entirely undetermined. Now, in this case, the court declared what were the questions they had to decide. One was, whether, under all the circumstances stated, the ship and cargo must be considered as *enemy's property*, and, as such, confiscated? Or, whether, on the contrary, they must be considered as *Swedish* property, and restored to the claimants?—But they determine that the ship and cargo are to be confiscated for the benefit of the republic. Now we must strain very hard, to make them contradict themselves in this sentence, if we say they did not mean to decide upon the property, when they expressly declare that the sentence depended entirely on *the question of property*. It has been said in argument that it appears, from one of the reasons of their decision, that they must have proceeded on the ground of their own ordinance of 1778, which declares, 'that the having 'a supercargo or chief officer of the enemy's country on 'board, is a sufficient ground of condemnation.' Now supposing, for a moment, that it was *chiefly*, for certainly it was not solely, through that medium that they arrived at that conclusion, would that have been sufficient to authorize us to treat the sentence as inconclusive. Supposing they had stated the facts of the case, without any reference to the ordinance, could any man say that those facts were so irrelevant to the conclusion they have drawn of enemy's property, that a court of common law would have thought itself at liberty to go into the question.

The party producing the sentence is not obliged to shew the ground of it to be enemy's property, but the *party* objecting to it must shew the contrary.

tion, and see *whether the conclusion was warranted or not* The court of King's Bench has always disclaimed such a jurisdiction (*a*). Then does it vitiate the sentence that a court of competent jurisdiction has said, there is an ordinance which warrants and supports such a sentence? These ordinances have been misunderstood; sometimes by the *French* courts of admiralty themselves, and sometimes by the courts in this country Those in *France* considered these ordinances as making the law, and as binding on neutrals, and have therefore, sometimes declared, in the same breath, that the property was neutral, and yet that it was liable to condemnation: Whereas all that was meant by those ordinances was, to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When *Louis XIV.* published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for *Europe*, merely because he collected together, and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in *France*. I say, as understood in *France*, for although the law of nations ought to be the same in every country, yet, as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations; but it was judged convenient to declare certain *principles of decision*, partly for the purpose of giving an uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. And it was truly observed at the bar, in the course of the argument, that it has been matter of complaint

Observations on the force and effect of foreign ordinances.

(*a*) In *Bernardi* v. *Motteux*, sup. 395. it was determined that where the sentence is ambiguous, the ground of it may be examined.

against

againſt us (how juſtly is another conſideration), that we have no code by which neutrals may learn how they may protect themſelves againſt capture and condemnation. Now this court, in this caſe, ſeems to me to have well and properly underſtood the effect of their own ordinances. They have not taken them as poſitive laws binding upon neutrals, but they refer to them as eſtabliſhing *legitimate preſumptions*, from which they are warranted to draw the concluſion which it is neceſſary for them to arrive at, before they are entitled to pronounce a ſentence of condemnation (*a*). Suppoſing they had only ſtated

(*a*) Legitimate preſumptions are, I conceive, ſuch as by a fair and reaſonable interpretation, are deducible from the facts of a caſe. Every court, by its own inherent authority, has the power of raiſing ſuch preſumptions, and it requires no poſitive law to enable it to do ſo. A preſumption which can only be raiſed by the authority of a poſitive law, cannot be a legitimate preſumption, in the ſenſe in which I underſtand that term; but muſt be a forced or conſtrained one, and not neceſſarily deducible from the facts. The law of nations, like municipal law, has its rules of evidence, without which its conſtitutions could never be enforced. But, to maintain that any ſtate may, by its own ordinances, enjoin its courts to raiſe preſumptions not warranted by the facts, is to acknowledge in the legiſlature of every ſtate a power of rendering nugatory all the ſanctions of public law. Individual ſtates may, by mutual compact, make rules which ſhall be binding upon themſelves. For inſtance, two ſtates may ſtipulate that an individual ſubject of a hoſtile ſtate found on board a ſhip of either of the contracting parties, ſhall be deemed concluſive evidence that the ſhip and cargo are enemy's property: This would be binding upon each of theſe ſtates, as long as the treaty remained in force. But any ſtate which, by its own ordinances, ſhall declare that an individual ſubject of a hoſtile country being found on board a neutral ſhip, ſhall be concluſive evidence to prove that the ſhip and cargo are enemy's property, muſt at once renounce all pretenſions to juſtice, and deny that public law has in itſelf any binding force.

ſtated

stated the facts, as they are now before us, are they to be considered as so irrelevant, that a court of common law would say, that this sentence is repugnant to justice, and not warranted on the ground on which it has proceeded? Supposing all the circumstances of this case had been brought before a *British* court of admiralty, I think it would be questionable whether they would have permitted further proof. The property, I apprehend, would hardly have escaped condemnation in the first instance. The result of all the cases is, '*that a sentence of a court of admiralty is conclusive as to all that it professes to decide.*' Now, is it possible to say, that this court did not profess to decide whether this was, or was not, enemy's property? It was the only question this court did profess to decide."—Lord *Glenbervie* observed that, in the case of *Pollard* v. *Bell* (a), the *French* court did not *profess* to go on the ground of *enemy's property*; and, that the very first fact stated in that case was, "*that the ship was neutral property.*"

If the condemnation be for the want of the requisites of a neutral, it will be conclusive.

If a ship described as *American*, which is equivalent to a warranty (b), be condemned as prize because she wants certain requisites to entitle her to the protection of such neutral state; this will falsify the warranty.

Baring v. *Claggett*, 3 *Bos.* & *Pul.* 201.

A ship described as *American*, is condemned because the captain was not an *American* citizen, and the owner was a *British* subject not naturalized in *America*, contrary to the treaty between *France* and *America*:—This falsified the warranty.

Thus:—Goods were insured, in *June* 1796, on board the *Mount Vernon*, 'At and from *Philadelphia* to *London*, 'with liberty to touch at one port in the *Channel*, at a 'premium of three guineas *per cent.* the ship being stated 'in the policy to be *American*.'—The ship, within two hours after she sailed, was captured by a *French* privateer, and carried into the *Spanish* island of *Porto Rico*.—In an action on the policy, it appeared that the ship was the property of *W. M. Duncanson*, who was born a *British* subject, had resided in the *United States of America* from *August* 1794, and was naturalized in *October* 1796, but

(a) Supra, 3[illegible]. (b) So held by all the judges in *Lothian* v. *Henderson*, 3 *Bos.* & *Pul.* 499; inf. 430.

not

not till after the ship was captured; that the ship had before belonged to an *American* citizen, and was registered at *Philadelphia* in his name when she sailed; that she was furnished with the following documents; 1st, a certificate of clearance, with a manifest of her cargo annexed; 2d, a sea-letter or passport in *French*, *English*, and *Dutch*, beginning thus; 'Be it known, that leave 'and permission has been granted to *George G. Dominick*, 'master or commander of the ship called the *Mount Ver-* '*non, of the town of* PHILADELPHIA, *of the burthen of* 424 '*tons or thereabouts, being at present in the port of* PHILA-'DELPHIA, and bound for *Hamburgh*, loaded with sun-'dries as per manifest;' that, while she remained at *Porto Rico*, the provisional tribunal of prizes at *St. Do-*'*mingo* pronounced a sentence, intituled, "Condemnation "of the *English* ship *Mount Vernon*;" which stated, 'that 'the captain had thrown papers overboard; that he was a '*Portugueze* without any certificate of his naturalization; 'then adds several other less important grounds; and con-'cludes with declaring that these are sufficient motives 'to condemn the ship and cargo, and accordingly they 'are condemned as having been justly captured by the 'captain of the privateer to whom they are adjudged as his 'property.' The case likewise set forth several provisions of the treaty of the 6th of *February* 1778, between *France* and *America*, by the 25th article of which it is stipulated, 'that in case either of the parties shall be engaged in war, 'the ships belonging to the subjects of the other must be 'furnished with sea-letters or passports, expressing the 'name, property, and bulk of the ship; *as also the name* '*and place of habitation of the master*, that it may thereby 'appear that the ship truly belongs to the subjects of one 'of the parties.' The case also set forth several of the *American* navigation laws, which have provided, 'that 'ships and vessels registered by virtue of certain acts shall 'be denominated and deemed ships and vessels of the '*United States*, and entitled to the benefits and privileges 'appertaining to such ships or vessels: Provided, that '*they shall not continue to enjoy the same longer than they* '*shall continue to be wholly owned, and to be commanded by,*

 citizens

'*citizens of the* United States.'—The court, upon this case, gave judgment for the defendant. But, in the report, the grounds of their decision do not very distinctly appear. There is, however, one so obvious that it ought at once to have precluded all doubt upon the subject.—As *Duncanson* had not acquired the rights of an *American* citizen at the time of the capture, it followed that the *Mount Vernon* was not an *American* ship, within the meaning of the *American* navigation laws; and this, of itself, was a sufficient ground of condemnation.

Baring & ors. v. *Christie*, 5 *East* 398.

The passport in the foregoing case, granting leave to *G. D.* 'master of the ship *M. V.* of the town of *P.* of the burthen, &c.' does not specify the place of habitation of the *master*, but only the place to which the *ship* belongs.

Another action was afterwards brought in the court of *Common Pleas*, upon the same policy, and a special verdict found, which stated the same facts as in the former case; and the cause being removed by writ of error into the court of *King's Bench*, the judgment of the court of *Common Pleas* was there affirmed.—The decision of the *King's Bench* proceeded solely upon the ground that the passport which was found on board did not, in compliance with the 25th article of the treaty, specify the place of habitation of the master of the vessel; the court being of opinion that the words "*of the town of Philadelphia,*" in the passport, could not, by any grammatical or fair construction, be referred to *George G. Dominick*, the *master*, but only to the *ship*.

By express stipulation, the insured may avoid the effect of a foreign sentence.

If the ship be described in the policy as belonging to a neutral state, this is equivalent to an express warranty of neutrality: But this may be explained by a subsequent agreement, so as to preclude the effect of a foreign sentence of condemnation as enemy's property, where, in point of fact, the ship was neutral property.

Lothian & ors. v. *Henderson* & ors. 3 *Bos.* & *Pul.* 499.

Goods are insured on board a ship described as 'an *American* 'vessel,' from *Virginia* to *Holland*. Doubts arose whether the policy contained a *warranty*; where-

Thus—A cargo of tobacco was insured at *Glasgow*, on account of Messrs. *Henderson* and Co. on board the *Catherine*, "an *American* vessel," from *Virginia* to *Holland*, at ten guineas *per cent.*—Soon after the policy was effected, doubts having arisen whether the words, "an *American* "vessel," amounted to a warranty, the underwriters signed a paper declaring, 'that, in case of capture or seizure, '*Henderson* and Co. before they claimed for a loss, must 'produce proof of the ship being an *American* bottom, 'and,

'and, by bills of lading, ſhew the tobacco to have been 'ſhipped on account and riſk of *Henderſon* and Co.; 'upon which they would ſettle, by granting their bills at 'four months, for the amount of their ſubſcriptions, 'deducting the ſtipulated premium, in full dependence 'that the inſured would uſe their beſt endeavours to 'recover the property for account of the ſhippers.'—The *Catherine* was captured on her voyage by a *French* privateer, and condemned as *enemy's property*, becauſe ſhe had not on board a *role de'quipage*, or muſter-roll, purſuant to a law of the *Directory*, 12th *Ventoſe*, 5th year, which declares lawful prize, and orders to be treated as *enemy's property*, all ſhips of the *United States* unprovided with muſter-rolls, conformable to the model of the paſſport annexed to the treaty of 1778, between *France* and *America*.—Upon appeal to the higher tribunal, this ſentence was confirmed.—Intelligence of theſe events arriving at *Glaſgow*, the agents of *Henderſon* and Co. communicated it to the underwriters, and laid before them the bill of lading to ſhew that the cargo was ſhipped on account of *Henderſon* and Co. together with a certificate of the *American* vice-conſul at *Nantz*, that the ſhip's papers were detained there, and requeſted them to ſettle the loſs according to agreement.—The underwriters refuſed, and a ſuit was inſtituted againſt them in the admiralty court of *Scotland*, which decreed in favour of the inſured; which decree, upon appeal, was affirmed in the court of Seſſion, and, upon appeal to the Houſe of Lords, finally affirmed there—The caſe was twice argued at the bar of the Houſe of Lords, the ſecond time in preſence of all the Judges, to whom this queſtion was put,—'Whether, 'taking it for granted that the ſhip had every document 'which *American* ſhips uſually had, or which *France* on 'former occaſions required (*a*), if, upon proof that the 'ſhip and cargo were *American* property, bills at four

upon the underwriters ſigned an agreement, 'That, in caſe 'of capture or 'ſeizure, the in'ſured on pro'ducing papers 'to prove that 'the ſhip and 'cargo were 'really neutral, 'ſhould be en'titled to his 'loſs.' The ſhip is captured, and condemned as *enemy's property*:—The words "*American veſſel*," amount to a warranty of neutrality; and the proof required being adduced, is ſufficient to ſatiſfy the warranty, though without the explanatory agreement, the foreign ſentence would have been concluſive to falſify it.

(*a*) The want of a *role d'equipage* was one of the grounds of condemnation in the caſe of *Guyer* v. *Aguilar*, 7 T. R. 631. ſup. 404.

'months

'months had been given by the underwriters to the insured 'for the loss, and such bills had remained in their hands 'till after the sentence of condemnation, the insured 'could have recovered against the underwriters on those 'bills, notwithstanding such intervening sentence (*b*)?'—All the Judges held clearly that the words, "An *American* vessel," in the policy, amounted to a warranty. They agreed, also, that it is fully established, and not now to be disputed, that the sentence of a foreign court of prize, condemning a ship or goods as *enemy's property*, no matter by what deduction they come to that conclusion, is binding and conclusive in our courts.—Upon the principal question the Judges differed in opinion.—Mr. Justice *Laurence*, Mr. Justice *Le Blanc*, and Mr. Justice *Chambre* held, that the explanatory declaration had not the effect of varying or narrowing the sort of proof which it is in general competent to the insured to adduce in support of his claim, or to the underwriters to use in resisting it; and, therefore, that it did not shut out the effect of the sentence of condemnation; and that this was conclusive in favour of the underwriters to falsify the warranty.—The Lord Chancellor (Lord *Eldon*), with the rest of the Judges, being of opinion that those who do not chuse to subject themselves to the caprice or injustice of a *French* court of prize, may stipulate in the policy, that the sentence of a *French* court shall not be adduced in evidence against their claim, held that the effect of the explanatory declaration was, that, if the words, "an *American* vessel," in the policy, should amount to a warranty, then the insured should be at liberty, in case of loss, to prove the ship and cargo to be *American* property, in the manner stipulated, so as to

An insured may stipulate that a foreign sentence shall not be conclusive against his claim.

(*b*) This appears to have been a mere speculative question, the underwriters not having given any bills to the insured. The judges, however, in giving their opinions, did not confine themselves to this narrow view of the case, but went at large into the law arising out of the real facts.

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If, in a foreign sentence, there be several grounds of condemnation set forth, and one of them be a good and legal ground, it will be conclusive to falsify the warranty, though joined to several bad ones.

One legal ground will be conclusive, though joined to several bad ones.

As, where goods were insured on board the *Rosanna*, warranted *American* ship and goods, from *Surinam* to *London*, *Rotterdam*, or *Hamburgh*.—The ship was captured by a *French* privateer, carried into *Rochelle*, and there adjudged by the tribunal of commerce to be restored to the owners. On appeal, this decree was reversed, and the ship and cargo condemned. The grounds of the sentence were, 'That the captain of the *Rosanna* had not produced a list of the crew signed by the marine officers of '*New York*, from whence she failed; that he had not the 'sea-letter or passport required by the 25th article of the 'treaty of 1778 between *France* and *America*; that the 'pretended list of the crew produced by the captain was 'a nullity, not being authenticated by any signature or '[illegible] who composed the 'crew [illegible] at *Surinam*, and seven at *London*; 'and [illegible] composed of more than 'one-third [illegible], contrary to the ordinances of 1704 and '1744 [illegible] ship and cargo were '*American* [illegible] in point of law, to entitle 'the [illegible] infringed the above 'ordinance of 1744 [illegible] the treaty.' This sentence [illegible] cassation, was affirmed [illegible] contended that, inasmuch as the sentence proceeded on the ground of a violation of an ordinance not binding upon *America*, though aided by objections founded on the treaty, it could not be deemed to falsify the warranty.—But the court held that, in as much as the sentence proceeded on the ground of an infraction of the treaty, the ship not having those documents with which in the judgment of the *French* tribunal, she ought to have [illegible] falsified the warranty.—Lord *Ellenborough* said,—" I do not say that they have construed the treaty rightly: On the contrary, suppose them to have construed it ever so iniquitously, yet, having competent jurisdiction to construe it, and

Baring v. Roy. Ex. Assur. 5 East 99.

An *American* ship is condemned on the ground that she was not documented according to treaty, and upon the breach of ordinances which were not binding upon *America*:—The sentence will falsify the warranty.

having professed to do so, we are bound to give credit to their adjudication."

A foreign sentence will be conclusive, though it collect the *indicia* which govern its decision from ordinances not binding upon other states.

It is competent to every court of prize to decide whether a captured ship be neutral or not; and if it actually determine this question, its decision against the ship's neutrality has been holden to be conclusive in our courts to falsify the warranty; even though it profess to conform to, and to collect the *indicia* which govern its decision from ordinances of its own government, which are not binding upon other states.

Bolton v. *Gladstone*, 5 *East*, 155.

A neutral is condemned because she had not conformed to a *French* ordinance, which was not binding upon the neutral state:—The sentence is conclusive.

As, where an insurance was effected on the ship *Oxholme* and her cargo, both warranted *Danish* property, 'at 'and from the island of *St. Thomas* to the coast of *Africa*, 'and from thence to *Surinam*.'—The ship and cargo were the property of *J. Hazzell*, *J. Murphy*, and *R. D. Jennings*, who at the time of loading the goods, and at the time of the capture, were subjects of *Denmark*, residing at *St. Thomas's*. The ship was captured in her voyage by the *French*, carried into the *French* island of *Senegal*, and though she was furnished with every document usually carried by *Danish* ships, was there condemned. The sentence stated that 'the *built* of the ship was unknown; 'that she was sold to a neutral subject only since the de'claration of war; that the bill of sale did not mention 'her *place of built*, or her *original owner*; that the mate 'and third officer were *naturalized Danes* only since the 'declaration of war; and that the greater part of the 'crew were the *subjects of hostile powers*, and then con'demned both ship and cargo *as lawful prize*, conform'ably to the regulations, concerning prizes of the 21st of '*October* 1744'.—The court determined that this sentence falsified the warranty, and that no evidence could be received to disprove the facts upon which it was founded, though the ship was declared lawful prize upon re'gulations which are not binding upon other states.'—Lord *Ellenborough*, in delivering the judgment of the court, said, "The *French* prize court was competent to decide upon the neutrality of the ship; and if, in the professed exercise of its functions, it has decided upon that point, its decision must conclude the question. Looking therefore at the whole of the sentence, including the ordinance

to

to which it professes to conform, it is impossible not to see that the prize court, upon the presumption of the ship's being enemy's property, or at least not neutral, in respect of certain *indicia* on that head collected from the ordinance referred to. And having, under the circumstances stated, decreed the vessel to be *good prize*, they have decided that the fact which is the subject of the warranty is substantially untrue. And having so decided, we are bound to hold the warranty to be fully disproved, and the plaintiff barred, therefore, from recovering upon the policy."

3. *What shall amount to a forfeiture of neutrality.*

The warranty of neutral property must not only be true at the time the policy is effected, but the insured must take care that he do not, by any act or omission on his part, forfeit his neutrality. Such forfeiture, by the wilful act of the master or mariners, though in some instances it may amount to barratry, is a breach of the warranty, and avoids the policy from the time it is committed; nor can the insured recover upon it for any loss happening afterwards, though it proceed from a cause wholly unconnected with the warranty (*a*). For it is of little importance to the insurer whether a ship be liable to capture or detention as being enemy's property, or for having forfeited her neutrality.

A ship may forfeit her neutrality by any act done or attempted against the law of nations, or in contravention of particular treaties with any of the belligerents.—What act shall amount to a forfeiture of neutrality is often a question of much doubt and difficulty.

Salucci v. Johnson, B R. Hil. 25 G. III. MS.

It has been holden that a neutral is not bound to submit to search.

The most frequent cause of such forfeiture is the refusal of neutral ships to submit to visitation and search by belligerent cruizers. When the question whether such resistance amounted to a forfeiture of neutrality first came to be debated in *Westminster Hall*, the judges of the court of *King's Bench* (*b*) agreed that a ship warranted neutral

(*a*) R. *Woolmer* v. *Muilman*, 4 *Bur.* 1419. 1 *Bl.* 427.—

(*b*) *Willes*, *Ashurst*, and *Buller*, Js. Lord *Mansfield* being absent.

must

must so conduct herself as not to forfeit her neutrality; and that if, by the wilful act of the captain, she do this, to the injury of the owners, it will amount to barratry: But they held, *that a neutral ship is not bound to submit to be searched*, search being an act of superior force, rather than the exercise of a right, which may always be resisted when the party is able to do so.

This decision not warranted by the law of nations.

These learned judges seem to have adopted this opinion, without sufficient consideration.—The ground of their decision seems to have been, that, as the capture and condemnation of the ship insured were warranted only by the particular ordinances of the *Spanish* government, the sentence was no evidence to prove that the ship had forfeited her neutrality.—What the particular ordinances alluded to were, does not appear. The sentence stated that the ship had refused to submit to a search, and had resisted with force, *contrary to the Spanish cruising orders*. If those cruising orders directed that a neutral ship which should resist a search should be seized and confiscated, the question would then have been, whether such orders were warranted by the law of nations; for if they were, the resistance was a forfeiture of neutrality, and a just ground of capture and confiscation; nor were they less so, because they were enforced by an express provision in the *Spanish* cruising orders.—It is now settled that the law of nations does give to every belligerent cruiser the right of visitation and search of all merchant ships, and that a resistance to such search amounts to a forfeiture of neutrality.

A resistance to search is a breach of neutrality.

Garrels v. Kensington, 8 T. R. 23.

A court of admiralty condemns a ship and cargo, because the master and crew had forcibly rescued the ship from a prize-master sent with her into port by a belligerent cruizer, for the purpose of search:—This is a breach of the

Thus:—Goods were insured on board the *Dispatch*, 'At and from the island of *St. Thomas* to the *Havannah*; 'the ship and goods warranted *Danish* property.' In an action on this policy, to recover a loss by capture, it appeared,—That the ship and goods insured were the property of *Danish* subjects resident at the *Danish* island of *St. Thomas*; that, when the ship sailed on the voyage insured, she had on board all the papers usually carried by *Danish* ships; that she was captured by the *Pelican*, an *English* man of war, and condemned by a sentence of the *British* vice-admiralty court at *St. Domingo*, which stated, 'That the said neutral ship *Dispatch*, with the cargo on

'board,

'board, being *Danish* property, had been, under the law 'of nations and of war, and agreeably to existing treaties, 'stopped and detained by the captain of the *Pelican*, and 'sent by him to the port of *Mole St. Nicholas*, for the 'purpose of being legally examined, under the command 'of a midshipman, as prize-master, with two seamen; 'that on the near approach of the said ship to that 'port, the master and crew of the *Dispatch*, had, *in direct violation and breach of their neutrality*, as Danish '*subjects, and contrary to the law of nations, and the faith of treaties*, violently and forcibly, at a preconcerted signal, seized and taken possession of the said ship and 'cargo from the said prize-master and seamen, and had retained possession thereof till again captured by a *French* 'privateer; and that she was afterwards recaptured by 'the *Pelican*.' The judge then, after stating his reasons at large, adjudges and decrees the ship and cargo to be lawful prize, &c.—On the part of the plaintiff it was contended, that the sentence did not negative that the ship and cargo were originally neutral; but only stated facts from which the court concluded that she afterwards forfeited her neutrality; and that these facts, when examined, would not warrant that conclusion, *Danish* ships not being bound, by any treaties with *England*, to submit to be searched, much less to be violently taken possession of, and carried out of the course of their voyage for that purpose; and that, by the law of nations, a neutral ship was not bound to submit to be searched, according to the decision in the case of *Saloucci* v. *Johnson* (a). But the court decided that the sentence was conclusive evidence that the ship had been guilty of a breach of her neutrality, and that, therefore, the plaintiff was not entitled to recover.—Lord *Kenyon* said,—" The case of *Saloucci* v.

ship's neutrality, and conclusively proved by the sentence of a court of admiralty condemning her upon that ground.

(a) Sup. 387.—Another point wss made by the plaintiff's counsel, viz. that even if a right of search did exist, the act of the captain and crew in resisting it would at most amount to barratry, for which the underwriter would be liable. But this was answered by shewing that there was no count in the declaration for a loss by barratry.

Johnson professed, at last, to proceed on this ground, that the arbitrary ordinances of one country ought not to conclude the rights of the subjects of another; and that courts of justice ought to proceed on the acknowledged law of nations, and on the existing treaties between the different states. That case says that a ship, which is warranted neutral, must be so conducted as not to forfeit her neutrality. But was this ship so conducted? The sentence of the court of admiralty, which we cannot review, has expressly stated, 'that the master and 'crew of the *Dispatch*, in direct violation and breach of 'their neutrality, as *Danish* subjects, and contrary to 'the law of nations and the faith of treaties, violently 'seized and took possession, &c.' If we had constituted that court, perhaps, we might have drawn a different conclusion from the *facts* there stated: But we are now concluded by that sentence. Therefore, without contradicting the case of *Saloucci* v. *Johnson*, I think the defendant is intitled to our judgment. With regard to the question concerning the right of searching neutrals: Before the late armed neutrality, it was considered in this country, and so decided in many cases, that the right of searching neutrals is part of the law of nations; and it was supposed to be founded in reason."—Mr. Justice *Lawrence* said,—The argument founded on the case of *Saloucci* v. *Johnson* proceeds on a supposition that a point was there decided, which, in fact, was not decided: It was not there determined that this court can review the sentence of a court of admiralty, adjudging that a ship had forfeited her neutrality (*a*); for it was not there adjudged by the court

(*a*) The point there determined was, in substance, that the ship was justified in resisting a search, and that the sentence of the *Spanish* court of admiralty, being founded on the particular ordinances of that country, which made no part of the law of nations, was not conclusive to prove the legality of the capture. —If the ship did, in fact, forfeit her neutrality by the law of nations, the sentence was well founded; and its being stated in the sentence, that this resistance was contrary to the *Spanish* ordinances, does not destroy the validity of it.

of

of admiralty, that the ſhip had forfeited her neutrality. But looking into the grounds of this ſentence, we cannot but ſee that the ſhip was condemned for having violated her neutrality, and acted contrary to the law of nations and the faith of treaties."

The queſtion, as to the right of viſitation and ſearch, conſidered.

As oppoſite doctrines have been advanced in theſe two caſes upon a very important queſtion of the law of nations, I think it will not be improper, in this place, to enquire, whether, according to the practice of paſt times, and the opinions of the perſons moſt eminent for their learning in that law,—*Cruiſers, legally commiſſioned, have a right to viſit and ſearch neutral merchant ſhips at ſea; and whether a reſiſtance to ſuch ſearch amounts to a forfeiture of neutrality.*

Law of nations defined.

It may be proper here to premiſe that the law of nations does not conſiſt of the arbitrary ordinances of particular ſtates, dictated by intereſt, and ſupported only by force; but of thoſe principles and regulations founded in reaſon and general convenience, by which the mutual intercourſe between independent ſtates is every where conducted; and from which none can depart without offending againſt civil ſociety itſelf. What thoſe principles and regulations are, is to be collected from long eſtabliſhed practice amongſt civilized ſtates, which hiſtory has tranſmitted to us, and learned men have reduced to a ſyſtem.

Doctrine of Hubner.

M. *Hubner*, in the year 1759, publiſhed his treatiſe, *De la ſaiſie des bâtimens neutres*, compoſed for the purpoſe of juſtifying the northern powers in ſupplying the *French* with naval ſtores, without interruption from *Great Britain*. It is evidently a party production, more remarkable for its ingenuity, than for candour or fair reaſoning. It propoſes to prove, that *free ſhips make free goods*, that *the flag covers the cargo*, and therefore, that *neutral ſhips, acknowledged as ſuch, cannot be ſeized at ſea, though they be laden with contraband of war, or with enemy's goods* (a).

Two or three authorities, however, will ſuffice to remove all doubt upon this queſtion.

(a) Vid. *Hubner de la ſaiſ. des batim. neut.* part. 1. c. 8. § 7.

Of the Consolato del Mare.

In the *Consolato del mare* (*a*), one of the most ancient collections of marine laws now extant, it is laid down *first*, that if enemy's good be found on board of neutral ships, they may be taken, the captor paying the freight, and any other claim the captain of the neutral ship may have upon them; *secondly*, that if neutral goods be found on board of an enemy's ship, the ship may be taken and the goods restored, the owner of them paying the freight.

Of *Bynkershoek.*

Grotius, who cites this passage, does not afford much satisfaction on this question: *Bynkershoek*, however, was decidedly of opinion, that belligerent cruizers were warranted by the law of nations in visiting neutral ships, in order to examine their papers and seize enemy's property, if any should be found on board: But he denies that the captor is bound to pay the freight or any other charge to the neutral captain, as laid down in the *Consolato del mare* (*b*).

Vattel,

(*a*) Ch. 273.——(*b*) After a review of the several treaties between particular states upon this subject, by which it is stipulated that *free ships shall make free goods*, which *Bynkershoek* says, are only *exceptions to the general law*, he proceeds thus:—'*Sed quicquid sit, de ipsa ratione magis, quam de pactis, laborandum est. Eâ autem consultâ, non sum, qui videam, cur non liceret capere res hostiles, quamvis in navi amica repertas, id enim capio, quod hostium est, quodque jure belli victori cedit. Sin aias, me non rectè occupare res hostiles in navi amica, nisi prius occupem navim amicam, atque ita vim faciam rei amici, ut deprehendam rem hostis, idque non magis licere quam hostes nostros aggredi in amici portu, vel deprædari in territorio amici,* [illegible]*n animadvertas eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis, in navi repertis, constet, navem amicam esse. Si id constet, dimittam, si hostilem esse constiteret, occupabo. Quod si liceat, ut omni jure licet et perpetuo observatur, licebit quoque instrumenta, quæ ad merces pertinent, executere, et inde discere, an quæ hostium bona in nave lateant, et si latent, quidni ea jure belli occupem.—De eo sane non dubitant leges maritimæ* in Consulatu maris; *secundum has enim navis amica dimittitur, res hostiles in portum victoris productæ publicantur. Sed rursus rationem non habet quod ibi additur, oportere victorem magistro navis amicæ solvere mercedes sive vecturæ pretia, quia hæc non debentur nisi perductis mercibus ad locum destinatum. Si causeris, per magistrum non stetisse quo minus eo perduxerit, verum dicis; sed magister, suo periculo,*

Vattel, a *French* author of great eminence, and not at all unfriendly to neutral rights, maintains by irrefragable arguments, not only the right of viſitation and ſearch, but alſo that a neutral ſhip which ſhould reſiſt ſuch viſitation and ſearch, may for that cauſe alone, be ſeized and condemned as lawful prize (*a*). Of *Vattel*.

Yet the *French* ſeem to have been always governed by their own laws upon this ſubject, without much regard to that which might be deemed the law of nations; and it is curious to obſerve how their regulations have fluctuated, from time to time, under the influence of an intereſted policy. *French* ordinances.

According to the ancient laws of *France*, neutral ſhip was always confiſcated which was taken with enemy's goods on board; but with an exception in favour of the *Hans Towns* (*b*).

By the ordinance of 1543, art. 42, and that of 1584, art. 69, every neutral ſhip, in which ſhould be found any enemy's goods, and all goods found in an enemy's ſhip, though belonging to any ally, were declared good prize (*c*).

But the rigour of theſe regulations was mitigated by a declaration of *February* 1650, which directs that the goods of the friends and allies of the king, captured by his ſubjects, ſhould be reſtored.

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culo, merces hoſtiles navi ſuæ impoſuit, gnarus, eas capi, et ſic in portum capientis perduci poſſe. Nihil igitur habebit querelarum, ſi ſola navis demittatur, niſi inte[illegible]*m et victorem convenerit, ut ipſe merces hoſtiles deferat ad locum deſtinatum, tranſlata ſic in victorem cauſa locationis conductionis. Quæſt. jur. pub. lib.* 1, *c.* 14.——(*a*) *Vid.* Vattel, *droit des gens, liv.* 3, *c.* 7, *art.* 113, 114.——(*b*) *Vid.* Bynk. *quæſt. jur. pub. lib.* 1, *c.* 14.——(*c*) *Vid. Emerg.* t. 1. p. 450.—*Hubner de la ſaiſie des batim. neut.* part. 1, c. 4, § 7, after animadverting upon the ſeverity of the *Romans*, towards perſons carrying on trade with their enemies, proceeds thus;—' *Les ſentimens et la conduite de la* France, ' *ont été, dans les ſiècles precedens, bien plus équitables à ces ſujet.* ' *Son gouvernement n'a jamais prétendu troubler la navigation et le* ' *commerce ordinaire des états neutres avec ſes ennemis.* ' *On n'a* ' *qu'a voir là deſſus le* 42*me. chapitre de ſon ordonnance de l'année*

' 1543.

The famous ordinance of the marine of 1681 (*a*), reſtored the ancient ſeverity, and declared that all ſhips laden with enemy's goods, and all goods, either of the king's ſubjects or of his allies, which ſhould be found in enemies' ſhips, ſhould be good prize.

And, by an order of council, dated in *October* 1692, it is commanded, that the above article of the ordinance of 1681, ſhould be executed according to its tenor and form, without any diſtinction, modification, or reſtriction, unleſs authorized by the king's particular order.

By a regulation of *July* 1704, it was likewiſe ordered, that if any enemies' goods ſhould be found in any neutral ſhip, the ſhip and all her cargo ſhould be good prize.

This rigour was again ſoftened by a regulation of *October* 1744, which directs that enemy's goods found on board of neutral ſhips ſhould be good prize; but that the ſhips themſelves ſhould be releaſed; and we ſhall preſently ſee them carrying this mild principle ſtill farther.

Northern confederacy.

Several northern nations, deſirous of carrying on an unreſtrained commerce with all belligerent powers, and of avoiding the inconvenience of having their veſſels ſtopped and ſearched at ſea, have, in many inſtances, introduced, by their particular treaties, a new principle, namely, that "*free ſhips make free goods.*" But this was nothing more than controuling, in particular caſes, the general principles of the law of nations, by ſpecial compacts which were binding only upon thoſe who were parties to them. But, as a general rule, *Great Britain* has always denied this new doctrine, and inſiſted on the ancient principle. During the *American* war, in which *Great Britain* ſtood alone againſt *France*, *Spain*, *Holland*, and her own revolted colonies, *Ruſſia*, *Sweden*, *Denmark*, and other inferior ſtates, formed a league mutually to ſupport each

' 1543, *confirmé par celle de l'année* 1584, *et l'on trouvera que* ' *ces réglemens ſont bien conformes aux arrêts du code univerſel des* ' *ſociétés ſouveraines ſur cette matière*;'—Let this extract ſuffice at once as a ſpecimen of M. *Hubner's* candour and veracity, and as a proof of the view with which his treatiſe was compoſed. —(*a*) Tit. *Des priſes*, art. 7.

other

other in repelling the right claimed by the *English*, and in ſupporting what the *French*, ſince their revolution, have called the *modern law of nations*.

The empreſs of *Ruſſia*, who put herſelf at the head of this confederacy, cauſed a declaration, dated the 28th of *February* 1780, to be delivered to the miniſter of each of the belligerent powers, to this effect:—'That neutral ſhips ought to be at liberty to navigate freely from 'port to port, and upon the coaſts of the nations at war; 'that the goods and effects of the ſubjects of the belligerent powers ſhould be free, with the exception of contraband goods; that no goods ſhould be conſidered as 'contraband, but ſuch as were ſpecified in the 10th and '11th articles of the treaty of commerce, between *Ruſſia* 'and *Great Britain*, dated the 20th of *June* 1766; that 'to aſcertain what ſhould be deemed a blockaded port, 'it was determined, that none ſhould be admitted to come 'within that deſcription, but ſuch, only, where, by reaſon 'of the near approach of the ſhips employed in the attack, there was an apparent danger that they would be 'able to enter it; and finally, that theſe principles ſhould 'ſerve as a baſis for all proceedings and judgments upon 'the legality of prizes.'

The empreſs ordered her fleets to arm in ſupport of this new doctrine, and *Sweden* and *Denmark* followed her example. Thus was formed what was called the *armed neutrality* of the North. It was a blow aimed at once at the ancient maritime juriſprudence of *Europe*, and the naval ſuperiority of *Great Britain*, which *France*, either foreſeeing, or being privy to, anticipated by a declaration dated the 26th of *July* 1778, in which it was ordered,—'That no neutral ſhips ſhould be ſtopped or 'brought into the ports of *France*, though they ſhould be 'coming from, or going into, the ports of the enemy, 'except ſuch as ſhould be bringing ſuccours to places 'blockaded, inveſted, or beſieged; and that, as to neutral 'ſhips which ſhould be laden with contraband goods 'deſtined for the enemy, they might be ſtopped and the 'goods ſeized and confiſcated; but that the ſhips themſelves, and the reſt of their cargoes ſhould be releaſed, 'unleſs the contraband goods ſhould amount to three-

'fourths in value of the cargo; in which case the ship 'and the whole cargo should be confiscated; the king reserving to himself the power of revoking this liberty, if 'the enemy within six months should not make a similar 'concession.'

But though *Great Britain* never made any concession of a similar kind, yet the *French* did not revoke theirs, except with respect to the *Dutch*, whom they were then endeavouring to force into the war.

The success which unfortunately attended this armed neutrality, gave birth in the last war (*a*), to a similar attempt in the same quarter. But the vigour and ability by which the views of this new confederacy were frustrated, reflect equal honour on those who, at that time, directed the councils of this kingdom, and on the gallant persons who executed their orders. Their spirited exertions, happily for this country, not only vindicated the ancient system, but taught those who would subvert it, that the attempt can never again be made with impunity, so long as she retains her naval strength. Little, indeed, would that strength avail, should she ever be induced tamely to yield up this important point.

Should the least doubt remain in any impartial mind as to the admissibility of the principle which this country contends for, it must vanish upon the perusal of the following judgment delivered in our Court of Admiralty by a learned person, whose virtues and talents cannot fail to excite the veneration and applause of all *Europe*.

Judgment of the court of admiralty in the case of the ship *Maria*.

That judgment was delivered in the case of the ship *Maria* (*b*), one of several *Swedish* vessels, sailing under the convoy of a *Swedish* frigate, which were condemned, after solemn argument, for resisting visitation and search.— The learned judge, after stating and commenting upon the facts of the case, proceeds thus:—"This being the actual state of the facts, it is proper for me to examine, to what considerations they are justly subject, according to the law of nations; for which purpose I shall state a few

(*a*) Viz. That concluded by the peace of *Amiens* in 1802.——
(*b*) 1 *Rob.* Adm. Rep. 340.

principles

principles of that syſtem of law which I take to be incontrovertible,—1ſt. *That the right of viſiting and ſearching merchant ſhips upon the high-ſeas, whatever be the ſhips, whatever be the cargoes, whatever be the deſtinations, is an inconteſtible right of the lawfully commiſſioned cruizers of a belligerent nation.* I ſay, be the ſhips, the cargoes, and the deſtinations what they may; becauſe, till they are viſited and ſearched, it does not appear what the ſhips, or the cargoes, or the deſtinations are; and it is for the purpoſe of aſcertaining theſe points, that this right of viſitation and ſearch exiſts. This right is ſo clear in principle, that no man can deny it who admits the legality of maritime capture; becauſe, if you are not at liberty to aſcertain, by ſufficient enquiry, whether there be property that can legally be captured, it is impoſſible to capture. Even thoſe who contend for the inadmiſſible rule, that *free ſhips make free goods*, muſt admit the exerciſe of this right, at leaſt for the purpoſe of aſcertaining whether the ſhips be free ſhips or not. The right is equally clear in practice; for the practice is uniform and univerſal upon the ſubject. The many *European* treaties which refer to this right, refer to it as pre-exiſting, and merely regulate the exerciſe of it. All writers upon the law of nations unanimouſly acknowledge it, without the exception of *Hubner* himſelf, the great champion of neutral privileges. In ſhort, no man in the leaſt degree converſant with ſubjects of this kind has ever, that I know of, breathed a doubt upon it. The right muſt unqueſtionably be exerciſed with as little of perſonal harſhneſs and of vexation in the mode as poſſible; but ſoften it as much as you can, it is ſtill a right of force, though of lawful force,—ſomething in the nature of civil proceſs, where force is employed, but a lawful force, which cannot be lawfully reſiſted. For it is a wild conceit, that wherever force is uſed, it may be forcibly reſiſted: A lawful force cannot lawfully be reſiſted. The only caſe where it can be ſo, in matters of this nature, is in the ſtate of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative ſituation of two countries

The cruiſers of every belligerent have a right to viſit and ſearch all ſhips on the high ſeas.

countries at peace with each other, no such conflicting rights can possibly coexist.—2dly. *That the authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully commissioned belligerent cruiser:* I say *legally*, because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity, or of national policy, are views of the matter, which, sitting in this court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a *Swedish* commissioned cruiser, during the wars of his own country, has a right, by the law of nations, to visit and examine neutral ships, the king of *England*, being neutral to *Sweden*, is authorized by that law to obstruct the exercise of that right with respect to merchant ships of his country. I add this, that I cannot but think that if he be obstructed by force, it would very much resemble (with all due reverence be it spoken), an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed (*a*), by special covenant, that the presence of one of their armed ships, along with their merchant-ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships, inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have an interest in making it. I am not ignorant that, amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the

No neutral sovereign has a right to deprive a cruiser of this right.

(*a*) It is made an article of the Treaty between *America* and *Holland*, an. 1782, art. 10, *Martin's* treaties, vol. 2, p. 255.

world,

world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorised speculations, it is not necessary for me to descant: The law and practice of nations, (I include particularly the practice of *Sweden*, when it happens to be belligerent), give them no sort of countenance; and until the law and practice are new modelled in such a *way* as may surrender the known and ancient rights of *some* nations to the present convenience of *other* nations, (which nations may perhaps *remember to forget* them, when they happen to be themselves belligerent), no reverence is due to them; they are the elements of that system which, if it be consistent, has for its real purpose an entire abolition of capture in war;—that is, in other words, to change the nature of hostility, as it has existed among mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed amongst civilized states, and urging at the same time a pretension utterly inconsistent with all known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expence of the hazard of the harmony of states, and of the lives and safeties of innocent individuals.—3dly. *That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.* For the proof of this I need only refer to *Vattel*, one of the most correct, and certainly not the least indulgent of modern professors of public law. He expresses himself thus (*a*): '*On ne peut empecher le transport des effets de* '*contrebande, si l'on ne visite pas les vaisseaux neutres que l'on* '*rencontre en mer. On est donc en droit de les visiter. Quel-* '*ques nations puissantes ont refusé en différens tems de se sou-* '*mettre à cette visite;—aujourd'hui un vaisseau neutre, qui re-* '*fuseroit de souffrir la visite, se feroit condamner par cela seul,*

The penalty of resistance to search is the confiscation of the property withheld from search.

(*a*) Vid. liv. 3, c. 7, sect. 114.

'*comme*

'*comme étant de bonne prise.*' *Vattel* is here to be confidered, not as a lawyer merely delivering an opinion, but as a witnefs afferting the fact,—the fact that fuch is the exifting practice of modern *Europe*. And to be fure the only marvel in the cafe is, that he fhould mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, on which great part of the law of nations is founded, but of the private jurifprudence of moft countries in *Europe*,—that a contumacious refufal to fubmit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated *French* ordinance of 1681, now in force (*a*), "*That every veffel fhall be good prize in cafe of refiftance and combat;*" and *Valin*, in his fmaller commentary (*b*), fays exprefsly, that although the expreffion is in the conjunctive, yet that the *refiftance alone is fufficient* (*c*). He refers to the *Spanifh* ordinance of 1718, evidently copied from it, in which it is expreffed in the disjunctive,— "in cafe of refiftance *or* combat." And recent inftances are at hand and within view, in which it appears that *Spain* continues to act upon this principle (*d*). The firft time in which it occurs to my notice, on the inquiries I have been able to make in the inftitutes of our own country, refpecting matters of this nature, excepting what occurs in the black book of the admiralty (*e*), is the order of council of 1664 (*f*), which directs, 'That when 'a fhip, met withal by the royal navy or other fhip com'miffionated, fhall fight or make refiftance, the faid fhip 'and goods fhall be adjudged lawful prize.'—A fimilar article occurs in the proclamation of 1672. I am aware that in thofe orders and proclamations are to be found fome articles not very confiftent with the law of nations, as

(*a*) Art. 12.——(*b*) p. 81.——(*c*) In fome of the treaties of *France* this article is exprefsly inferted in the disjunctive. Vid. Tr. between *France* and *Hamburgh*, an. 1769.——(*d*) They acted upon this principle in the cafe of the fhip *Thetis*, which was the fubject of the above cafe of *Salloucci* v. *Johnfon*; the cafe, perhaps, to which the learned judge alluded.——(*e*) B. 7 & 8. (*f*) Art. 12, vid. *Thurloe's* ftate papers, vol. 1, p. 424.——

underftood

underſtood now, or indeed at that time; for they are expreſsly cenſured by Lord *Clarendon* (*a*). But the article I refer to is not one of thoſe he reprehends; and it is obſarvable that Sir *Robert Wiſeman*, then the King's advocate general, who reported upon the articles in 1673, and expreſſes a diſapprobation of ſome of them as harſh and novel, does not mark this article with any obſervation of cenſure. I am therefore warranted in ſaying, that it was the rule, and the undiſputed rule, of the *Britiſh* admiralty. I will not ſay that that rule may not have been broken in upon in ſome inſtances by conſiderations of comity or of policy, by which it may be fit that the adminiſtration of this ſpecies of law ſhould be tempered in the hands of thoſe tribunals which have a right to entertain and apply them; for no man can deny that a ſtate may recede from its extreme rights, and that its ſupreme councils are authorized to determine in what caſes it may be fit to do ſo, the particular captor having in no caſe any other right and title than what the ſtate itſelf would poſſeſs under the ſame facts of capture. But I ſtand with confidence upon all fair principles of reaſon,—upon the diſtinct authority of *Vattel*, upon the inſtitutes of other great maratime countries, as well as thoſe of our own country, when I venture to lay it down, that, by the law of nations, as now underſtood, a deliberate and continued reſiſtance to ſearch, on the part of a neutral veſſel to a lawful cruiſer, is followed by the legal conſequence of confiſcation."

But, in ſuch caſe, the neutral is ſuppoſed to have had notice of the war.

But to conſtitute a neutral character, and to bring a caſe within the operation of the law, it muſt be made appear that the veſſel, at the time of reſiſtance, had reaſonable grounds, to be ſatisfied of the exiſtence of a war; otherwiſe there is no foundation for the ſeveral duties, which the law of nations impoſes on neutrals (*b*).

Thus far of Warranties: We now proceed to treat of *Repreſentations*, upon the faith of which the contract is generally founded, or qualified and regulated.

(*a*) Lord *Clarendon's* life, p. 242.

(*b*) Per Sir *William Scott*, in the caſe of the *St. Juan Baptiſta*, 5 *Rob.* Adm. Rep. 3.

CHAP. X.

Of Reprefentations.

THIS fubject may be confidered under the following Heads:

I. *What fhall be a material Reprefentation, and how and when it may be made;*

II. *When a Reprefentation fhall be deemed to be fufficiently true.*

Sect. I.

What fhall be a material Reprefentation, and how, and when it may be made.

A reprefentation defined.

A REPRESENTATION, in infurance, is a collateral ftatement, either by writing, not inferted in the policy, or by parol, of fuch facts or circumftances relative to the propofed adventure, as are neceffary to be communicated to the underwriters, to enable them to form a juft eftimate of the rifk. Thefe communications are, in general, the principal inducements to the contract, and furnifh the beft grounds upon which the premium can be calculated.

Different kinds.

A reprefentation, like a warranty, may be either *affirmative*, as where the infured avers the exiftence of fome fact or circumftance which may affect the rifk; or *promiffory*, as where he engages for the performance of fomething executory.

When material.

A reprefentation is faid to be *material* when it communicates any fact or circumftance, the belief of which may be reafonably fuppofed to influence the judgment of the underwriters in undertaking the rifk, or calculating the premium. And whatever may be the form of expreffion ufed by the infured or his agent, in making a reprefentation, if it have the effect of impofing upon, or mifleading the underwriter, it will be material, and fatal to the contract.

There

There is a material difference between a representation and a warranty. A warranty, being a condition upon which the contract is to take effect, is always a part of the wrtiten policy, and must appear on the face of it (*a*): Whereas a representation is only a matter of collateral information or intelligence on the subject of the voyage insured, and makes no part of the policy.—A warranty, being in nature of a condition precedent, must be *strictly and literally* complied with; but it is sufficient if a representation be true in *substance.*—Whether a warranty be material to the risk or not, the insured stakes his claim of indemnity upon the precise truth of it, if it be affirmative, or upon the exact performance of it, if executory; but it is sufficient if a representation be made without fraud, and be not false in any *material* point; or if it be *substantially*, though not *literally*, fulfilled. A false warranty avoids the policy, as being a breach of a condition upon which the contract is to take effect; and the insurer is not liable for any loss though it do not happen in consequence of the breach of the warranty: A false representation is no breach of the contract, but if materil, avoids the policy on the ground of *fraud*, or at least because the insurer has been misled by it. Difference between a representation and a warranty.

It has already been shewn that a warranty must appear upon the face of the policy, and make a part of the written contract; and therefore a written paper, wrapped up in the policy, or even wafered to it, is only a representation (*b*). For the same reason, the written instructions for effecting the policy, unless inserted in it, cannot be deemed a warranty, but only a representation (*c*); for the underwriter, by not insisting on having these instructions, inserted in the policy, shews that he is content to take them as a representation. Written instructions, unless inserted in the policy, are only representations.

But it behoves all agents and brokers concerned in the effecting of policies, to keep correct entries of these instructions, and indeed of all representations made to the underwriters: For the whole question between the insured and the underwriters often turns upon these in- Agents and brokers should keep entries of all such instructions, and of every representation.

(*a*) Vid. sup. ch. 9. § 2.——(*b*) Sup. ch. 9. § 2.——
(*c*) *R. Pawson v. Watson, Cowp.* 785. inf. 458.

 structions.

They are responsible for the consequences of any representation made without authority.

structions. Besides, they are answerable to the insured for the consequences of any representation made by them without authority (*a*), as well for those of omitting to make such representations as they have been instructed to make.

When to be made.

A representation may be made by the insured, his agent, or broker, at the time the policy is effected. But a representation only made when the slip is presented for subscriptions, but not renewed when the policy is subscribed, has been holden not to affect the contract.

Dawson v. Atty, 7 *East*, 367.

A ship is represented as *American*, when the slip is presented for subscriptions, but not when the policy is effected:—This representation does not affect the contract; and the ship is not bound to be documented as an *American*.

As where goods were insured on board the *Hermon*, without mentioning in the policy to what country she belonged. The broker, when he offered the slip for subscriptions, said she was an *American*, but did not, at the time the policy was subscribed, represent her as belonging to any particular country, though she was, in fact, an *American*.—The ship, being captured by the *Spaniards*, was condemned as prize, for want of being properly documented, according to treaty.—The underwriters contended that the ship being, in fact, *American*, ought to have been documented as such.—But the court held that, as the ship was not represented to be *American*, at the time the policy was effected, and there being no undertaking or warranty in the policy that she was *American*, there was no necessity for her being documented as such (*b*).

Observations on this case.

And yet the law has not fixed any precise time when a representation ought to be made. It is sufficient, if it be made at any time before the policy is subscribed; and it would seem that an underwriter, when he puts his name on the slip, does so upon the faith of the representation previously made to him, (no matter when;) and he afterwards subscribes the policy without conceiving that any repetition of the representation is at all necessary.—In the case of *Christie* v. *Secretan* (*c*), the policy was on goods on board the *Peggy*, on a voyage from *Maryland* and *Virginia* to *Bremen*; and the broker, at the time of effecting the insurance, spoke

(*a*) Per Lord *Mansfield*, in *Pawson* v. *Watson*, *Cowp*. 787. —(*b*) Vid. sup. 385.—(*c*) Sup. 411.

of the ſhip as an *American*, but told the underwriters that he was directed not to warrant any thing: The court, nevertheleſs, held that it was neceſſary for this ſhip to be documented as an *American*.

A repreſentation may be untrue, either wilfully and fraudulently; or, inadvertently and innocently; and in either caſe, if it be a material repreſentation, it will avoid the policy.

A miſrepreſentation in a material point avoids the contract.

A wilful miſrepreſentation or, *allegatio falſi*, in any fact or circumſtance *material to the riſk*, is a fraud that will always avoid the contract.—As if an agent, knowing that a ſhip had ſailed from *Jamaica* for *London* on the 24th of *November*, tell the underwriters that ſhe ſailed in *December*: This is a fraud, and the policy is void (*a*).

And the inſured cannot recover though the loſs ariſe from a cauſe unconnected with the fact miſrepreſented.

And ſuch miſrepreſentation ſo completely vitiates the policy, that the inſured cannot recover upon it, even for a loſs ariſing from a cauſe unconnected with the fact or circumſtance miſrepreſented. As if the inſured repreſent that the ſhip or goods inſured are neutral property, when in fact they are enemy's property; he ſhall not recover even for a loſs occaſioned by ſhipwreck (*b*).

So, if the inſured know not whether it be true or falſe; or even believe it to be true.

So it would be if the inſured, his broker, or agent, were to *aſſert* that a ſhip or goods were neutral property, without knowing whether this were true or falſe, and they are in fact enemy's property: For, though it may not, perhaps, be equally criminal *in foro conſcientiæ* for a man to aver that to be true which he knows nothing of, as to aver that to be true which he knows to be falſe; ſtill it is equally a fraud, and in the caſe of an inſurance, equally injurious to the underwriter; becauſe he is induced by the deception, however occaſioned, to compute the riſk upon falſe principles. The ſame reaſoning holds even in the caſe where the perſon himſelf making the aſſertion *believes* it to be true.

(*a*) Per *Lee*, C. J. at N. P in *Roberts* v. *Fonnereau*, *Park*, 176. In *France* a fraud of this ſpecies is puniſhable criminally. *Valin* art. 41, h. t. This article of the ordinance directs that a perſon who is found to have inſured after he knew of the loſs, ſhall make reſtitution to the inſurer, and pay double the premium.——(*b*) Per *Holt*, C. J. *Skin*. 327.

But if he only give it as his *belief*, without knowing the contrary, it will not affect the contract.

But if he only say that he *believes* the ship to be neutral property, knowing nothing on the subject, and having no reason to believe the contrary: There, though the ship be not neutral, it has been holden that the representation will not avoid the policy; because the underwriter may inform himself of the grounds of this belief, before he enters into the contract; and if he neglect to do so, he takes upon himself the risk of its being unfounded (*a*).

Neither does the word *expected* amount to a representation.

For the same reason, if the word *expected* be used, this will not amount to a representation:—As where a broker, in getting insurances effected on several ships, belonging to the same owner, and speaking of them all, said,—'Which vessels are *expected* to leave the coast of '*Africa* in *November* or *December*,' when, in fact, they had all sailed in the *May* preceding:—This does not amount to a representation, being only an *expectation*, the ground of which the underwriter might have enquired into (*b*).

A misrepresentation made to the first underwriter is a misrepresentation to all.

By an extension of equitable relief in cases of fraud, it seems to be now settled that if a false representation be made to the first underwriter on the policy, in a material point, this shall be considered as a misprepresentation made to every underwriter, so as to infect the whole policy; otherwise it might be a contrivance to deceive many:

(*a*) This, in substance, is Lord *Mansfield*'s doctrine in the case of *Pawson* v. *Watson*, *Cowp.* 787. But with all the respect I entertain for so distinguished an authority, I cannot help thinking that there is, in this sort of declaration of *belief*, where the party knows nothing on the subject, a want of fairness which approaches very near to fraud; and it is to be hoped that very few instances of the sort occur in commercial transactions. No honest man would declare even his *belief* of a fact, when this declaration may have the effect of benefiting himself at the expence of others, without reasons for such belief, amounting almost to moral certainty. Nor is it quite clear that an underwriter is obliged to inform himself of the grounds of the insured's belief or expectation. It would seem rather that the latter is bound to shew upon what grounds his belief or expectation was founded. *Debet præstare rem ita esse ut affirmavit.*——

(*b*) Per. Cur. *Barber* v. *Fletcher*, *Doug.* 292. inf.

For

For when a reſpectable underwriter ſtands firſt on the policy, the reſt ſubſcribe without aſking a queſtion; if the firſt underwriter be impoſed upon, the reſt are entrapped by the ſame fraud (*a*).

Thus:—The ſhip *Franklyn*, on board of which goods were inſured, was repreſented to be an *American* by the broker who effected the policy, to the firſt underwriter to whom it was offered for ſubſcription. It appeared, however, *upon the policy*, that the defendant's name ſtood before that of the perſon to whom the repreſentation was made; but that the names of the underwriters, in the order in which they had originally agreed to underwrite, (which was different from that in which their names appeared on the policy), were minuted at the time upon a ſeparate ſlip of paper, on which the name of the perſon to whom the repreſentation was made ſtood firſt. —The court intimated an opinion that if a material fact be repreſented to the firſt underwriter to induce him to ſubſcribe the policy, it ſhall be taken to have been made to all the reſt:—But Lord *Ellenborough* at the trial, and the court afterwards were of opinion, that the paper in queſtion could not be received in evidence for this purpoſe, for want of a ſtamp; the effect of it being to ſhew that the contract entered into was different from that which appeared upon the face of the policy, in as much as the true contract was to be evidenced by the order in which the underwriters had engaged.

Marſden v. *Reid*, 3 *Eaſt*, 572. ſup. 341.

If a ſeparate ſlip of paper be produced to ſhew who was the firſt underwriter, it cannot be received in evidence unleſs it be ſtamped.

But the inſurer muſt avail himſelf of this ſort of objection in the firſt inſtance; for after a verdict has been obtained, the court will not ſet it aſide upon an affidavit of the firſt underwriter, that a material miſrepreſentation had been made to him. The defendant, in ſuch caſe, knows what has been repreſented to himſelf, and might have known what had been repreſented to the firſt underwriter; and he ſhall not lie by and take the chance of a trial, in order to make the objection, if the verdict ſhould be againſt him (*b*).

But this objection muſt be made at the trial, in the firſt inſtance; It will be too late afterwards.

(*a*) Per Lord *Mansfield*, in *Pawſon* v. *Watſon*, *Cowp.* 787. Vid. ſup. ch. 2. § 2.——(*b*) R. *Barber* v. *Fletcher*, *Doug.* 292.

If the insured state his computation as *fact*, and it prove untrue, it will avoid the policy.

Macdowall v. *Fraser*, *Doug.* 247.

A ship insured on the 30th of *January*, from *New York* to *Philadelphia*, is represented to have been safe in the *Delaware* on the 11th of *December*, when in fact she was lost on the 9th.—This being the result of the insured's *computation*, though not fraudulent, avoided the policy.

If the insured state his computation as *fact*, instead of the information on which he founds his computation, and it prove untrue, it is a misrepresentation; and if material, it will avoid the policy.

Thus:—An insurance was made in *London*, on the 30th of *January*, on a ship from *New York* to *Philadelphia*; and the broker then represented the ship to be, 'A tight vessel, had sailed with several armed ships, and 'was seen safe in the *Delaware*, on the 11th of *December*, 'by a ship which arrived at *New York*.'—In point of fact, the ship was lost on the 9th of *December*, by running against *a cheveux de frise* placed across that river. There was no imputation of actual fraud, on the one hand, nor any proof *when* the ship was seen in the *Delaware*, on the other.—There was a verdict for the defendant.—The plaintiff moved for a new trial, insisting, that the meaning of the representation was, that the ship had got through two-thirds of her voyage from *New York*, and beyond the reach of capture. To this it was answered, that the question of the materiality of the fact misrepresented was before the jury, who had determined that it was material.—The court held that the representation concerning the day being thus found to be material, and being also found untrue, the insured was not entitled to recover.—Lord *Mansfield* said,—" A representation must be fair and true, as to all that the insured knows; and if he represent facts without knowing the truth, he takes the risk upon himself. This case is very different from *Pawson* v. *Watson* (*a*), where the ship was only fitting out when the insurance was made. It was then only said, what was meant to be done; and what *was done*, was more advantageous than what had been represented. Though there was no evidence of actual fraud in this case; yet the underwriter was deceived as to the fact, and entered into the contract under that deception. The insured ought not to have taken upon himself to *compute* the day of the month on which the ship had been seen in the *Delaware*. It was his duty to state exactly his

(*a*) Inf. 458.

information,

information, and leave the underwriter to make the computation. In insurances on ships at a great distance, their being safe up to a certain day is always considered as a very important circumstance."

A misrepresentation, in a material point, equally vitiates the contract, whether it be the misrepresentation of the insured himself or of his agents, and whether it proceed from fraud, mistake, or negligence; for the insurer is thereby led into an error, and computes the risk upon false grounds.

A misrepresentation, whether by the insured or his agent, and whether fraudulent or innocent, avoids the contract.

Thus:—A policy on a cargo of oats was effected on the 21st of *September*, 'At and from *Hartland* to *Portsmouth*, lost or not lost, beginning the adventure from 'the loading at *Hartland*.'—The oats were shipped by *R. Thomas*, a cornfactor at *Hartland*, *on the 16th of September*, and the ship was lost the same day off *Hartland* pier. On that day *Thomas* wrote to the plaintiff's agent at *Portsmouth*, and informed him that he had *that morning* shipped the oats, and the ship sailed immediately, but he was afraid the wind was coming to the westward, and would force her back.—He also wrote, on the same day, to *Fisher*, the plaintiff's agent in *London*, to the same effect, in order that he might insure, adding these words, "I wish the whole safe to hand. This evening appears "stormy."—About six or seven o'clock the same evening *Thomas* heard that the ship *was on shore*, and at six o'clock the next morning (the 17th of *September*) he knew she *was lost*. The 16th was not a post day at *Hartland*, and the letters did not go from thence till noon on the 17th, and were received in *London* on the 20th.—*Fisher*, having been previously directed by the plaintiff to insure this cargo as soon as the bill should be sent him, he directed the insurance to be effected, which was done on the 21st. —Upon this case the court gave judgment for the defendant.—Lord *Mansfield* said;—"This policy was effected by misrepresentation, arising from the plaintiff's agent, who gave the intelligence. Now, whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void. The underwriter was warranted on the information of the agent, to take for

Fitzherbert v. Mather, 1 T. R. 12.

A letter, ordering an insurance to be effected, was written by the agent of the insured before, and sent after, a loss was known: This is a misrepresentation, whether it arose from fraud or negligence.

for granted that the ship was safe at noon on the 17th; and this information was purposely given by *Thomas* to *Fisher*, that he might insure. And though the letter might have been *written* before *Thomas* heard that the ship was on shore, yet he knew she was absolutely lost before he *sent* it; and he had full opportunity to send an account of the loss. If *Thomas* was not guilty of fraud, at least he was guilty of great negligence; and either way, or even if *Thomas* was quite innocent, the policy was void." Mr. Justice *Buller* said;—"Though the plaintiff were innocent, yet, if he take his information from his agent, and his agent be guilty of a misrepresentation, the principal must suffer; for, where one of two innocent persons must suffer by the fraud or negligence of a third, the loss shall fall on him who gave him credit."

Sect. II.

When a Representation shall be deemed to be sufficiently true.

It is sufficient if a representation be true in *substance*.

A representation being only matter of collateral information, it is sufficient if it be true *in substance*, and its not being inserted in the policy in the form of a warranty, is looked upon as a proof that the insurer does not require it to be strictly and literally true.

Pawson v. *Watson* Cowp. 785.

A representation was "12 guns "and 20 men;" and the ship sailed with 10 carriage guns, 6 swivels, 16 men, and 11 boys:—This being a greater force than 12 men, and 20 guns, the representation is true in substance.

Thus:—The *first* underwriter on a policy had this instruction shewn to him;—'3500 l. upon the ship *Julius* '*Cæsar* for *Halifax*, to touch at *Plymouth*, and any port 'in *America*. *She mounts* 12 *guns and* 20 *men*."—To the present defendant and the other underwriters, she was represented generally, as *a ship of force*. The instructions were dated the 28th of *June* 1776, and the ship sailed the 23d of *July* following. But at the time the policy was effected, there were neither men nor guns on board. The ship was captured; and, at the time she was taken, she had on board 10 carriage guns, 6 swivels, 16 men and 11 boys, which were more than equivalent

to

to 12 carriage guns and 20 men, in point of strength and convenience, and for the purpose of resistance; and it was proved, that in merchant ships, boys always go under the denomination of men.—It was objected, however, that guns meant *carriage* guns, not swivels; and that men meant *able seamen*, exclusive of boys.—But the court was of opinion, that had this representation of the ship's force been a *warranty*, the defence must have prevailed; because, though there were more than 20 men in the understanding of commercial men, yet there were not in fact 12 carriage guns: But this being a *representation* and not a warranty, and the ship having a greater force than if she had had 12 carriage guns, the representation was true in *substance*, and there was no fraud (*a*).

If the voyage be represented as less than the voyage in the policy, but that performed be within it, it will be protected.

If a representation shew that a less voyage is intended than that which is described in the policy; yet, if there be no fraud, and the voyage actually performed be within the policy, though greater than that mentioned in the representation, it will be protected by the policy.

Bize v. *Fletcher*, at N. P. *Doug.* 271.

The voyage in a policy is described to be from *L'Orient* to the *Isles of France* and *Bourbon*, *China*, *Persia*, and during the ship's stay and trade, &c. A representation describes it to be to *Madeira*, the *Isles of France*, *Pondicherry*, *China*, and back by the *Isles of France* to *L'Orient*:—Though the voyage in the representation be less than that in the policy, yet, the voyage performed being within the policy, is protected by it.

As where an insurance was made, 'At and from 'Port *L'Orient* to the Isles of *France* and *Bourbon*, to all 'or any ports or places whatsoever in the *East Indies*, '*China*, *Persia*, or elsewhere beyond the *Cape of Good* '*Hope*, from place to place; and during the ship's stay and 'trade, backwards and forwards, at all ports and places, 'and until her safe arrival back at her last port of dis-'charge in *France*.'—In an action on this policy, it appeared on the trial, that when the policy was subscribed, there was a slip of paper wafered to it, and shewn to the underwriters, on which was written the following representation: 'The ship has had a complete 'repair, and is now a fine and good vessel, three decks, 'intends to sail in *September* or *October* next; is to 'go to *Madeira*, the *Isles of France*, *Pondicherry*, *China*,

(*a*) This seemed to be the opinion of Lord *Mansfield* and the court; though the principal ground of the judgment was, that almost all the underwriters considered the ship to be a ship without force, and the premium suited to such a risk.

'the

'the *Isles of Frouce* and *L'Orient*.'—The ship sailed on the 6th of *December* 1776; arrived at *Pondicherry* the 23d of *July* 1777; continued there till the 23d of *August*; when, instead of proceeding to *China*, she sailed for *Bengal*, where she passed the winter; and, having there undergone considerable repairs, returned to *Pondicherry* early in 1778; from whence, having taken in her homeward cargo, she sailed for *L'Orient*; but was captured on that voyage in *October* in that year. It appeared that she spent much more time than is usual, in her voyages to and from *Bengal*, having touched and stayed at several places both in going and returning, and that the difference of insurance is one *per cent.* going to *Bengal* and not to *China*.—It was contended on the part of the defendant, that the representations restrained the voyage insured to the limits therein specified; and some letters were read, which, it was said, raised a presumption that the necessity of going to *Bengal* was merely a pretence devised after the capture.—Lord *Mansfield* told the jury in substance, "That the first question was, whether the policy was void on account of misrepresentation, which must be fraudulent, that is, *false* in a *material* instance, in respect to the risk *run*; that the representation meant to say; "I will have this understood as my present intention; "but I will have it in my power to vary it;" that fraud is found out by the materiality of the point it is charged in; and if they thought that this was a wilful misrepresentation to avoid paying the one *per cent.* the defendant would be entitled to a verdict: But if no fraud was intended, and the real intention, at the time of the representation, was to go to *China*, the plaintiff would be entitled to a verdict; for the insured might change his intention and go to *Bengal*, that voyage being clearly protected by the policy, which being expressed in more comprehensive terms, gave a greater latitude than the representation."—The jury accordingly found for the plaintiff (*a*).

(*a*) Some part of this summing up is taken from Mr. *Park's* note of this case, which differs materially from *Douglas*.

Even

Even if a reprefentation as to the courfe of the voyage be literally untrue, yet if it be made in conformity to an eftablifhed ufage of trade, and no perfon be deceived by it, and the voyage meant to be performed be within the policy, it will not avoid the contract.

If a reprefentation be even untrue, it will not avoid the policy, if the infurer be not deceived by it.

Thus:—An infurance was made on goods on board a *Swedifh* fhip. 'At and from *London* and *Ramfgate* to *Nantz*, 'with liberty to call at *Oftend*; being a general fhip in 'the port of *London* for *Nantz*.'—The fhip's clearances, and other papers from the cuftom-houfe in *London*, were made out for *Oftend only*, but the goods were fhipped for *Nantz*; and the fhip was intended to go directly to that place, without going to *Oftend*. Bills of lading in *French*, dated the 18th of *July* 1778, were figned by the captain in *London*, but purporting to be made at *Oftend*, expreffing that the goods were fhipped there, and were to be delivered at *Nantz*. The policy was fubfcribed on the 7th of *July*, and the goods were fhipped between the 24th of *July* and the 17th of *Auguft*. The proclamation for making reprifals on *French* fhips was publifhed on the 31ft of *July*. Two underwriters figned the policy, after the proclamation, at the fame premium given before. The captain, as foon as he failed, deftroyed the papers he had from the cuftom-houfe in *London*. The fhip failed on the 24th of *Auguft*, and was taken by the *Englifh*, and the goods condemned as *French* property.—In an action on the policy, one objection was, that the fhip had been cleared out for *Oftend*, though fhe was never defigned for that place, which was a fraud on the underwriters; that the fabrication of falfe and colourable papers, and the fuppreffion of the true deftination of the fhip, were circumftances of fraud, tending to miflead the underwriters, as to the voyage intended to be infured, and the nature of the rifk.—To meet this objection, it was proved to be the conftant practice, well underftood by all perfons concerned in this branch of commerce, that all fhips, going with goods of *Britifh* manufacture to *France*, clear out for *Oftend*, though they do not mean to go thither; by which the light-houfe duties, which are payable when the voyage is known to be directly down the channel, are faved; and

Planché v. *Fletcher*, *Doug.* 238.

A fhip infured from *London* to *Nantz*, with liberty to touch at *Oftend*, clears out for *Oftend* only, but means to go direct to *Nantz*, with bills of lading, purporting to be made out at *Oftend*, as if the goods had been fhipped there, in order to be able to import *Englifh* goods into *Nantz* at *Oftend* duties, and alfo to fave the light-houfe duties going down the *Channel*.—This being a conftant practice, and known to all concerned in this trade, is no fraud on the underwriters.—Nor will the intention to evade the light-houfe duties render the contract illegal.—The policy being effected before, and the fhip having failed after, a war broke out, does not affect the contract.

and the *French* duties are less upon goods from *Ostend* than from *England*. A second objection was, that, as hostilities were declared, after the policy was signed, and before the ship sailed, the defendant ought to have had notice that, he might have exercised his discretion, whether he would chuse, for a peace premium, to run the risk of a capture; and it was the duty of the insured to give the underwriter information that the ship continued in the river after the proclamation. It was also contended that, in time of war, the exportation of enemy's property in neutral bottoms was illegal, and that an insurance on such goods was void.—The court were clearly of opinion that the plaintiff was entitled to recover.—Lord *Mansfield* said;—"This verdict is impeached upon two grounds; *First*, that there was a fraud on the underwriters in clearing out the ship for *Ostend*, when she was never intended to go thither. But I think there was no fraud on them, perhaps not on any body. What was practised in this case was proved to be the constant course of trade, and notoriously so to every body. The reason for clearing out for *Ostend*, and signing bills of lading, *as from thence*, did not fully appear. But it was guessed at. The farmers of the revenue in *France* connive at the importation of *English* goods, and take *Ostend* duties, rather than exact a tax which amounts to a prohibition. But at any rate this was no fraud in this country. With regard to the evasion of the light-house duties, the ship was not liable to confiscation on that account (*a*). The second objection is, that the policy was made

(*a*) Though the ship might not have been liable to *confiscation* for evading the light-house duties, yet, as one motive for clearing out for *Ostend* was to commit a fraud against the laws of this country, this seems to be within the reason of the cases in which the policy has been holden to be void, where the voyage has been undertaken for illegal purposes. Vid. ch. 3, § 1 & 2. & ch. 6.—According to the foreign writers, a deviation is excusable, if it be to avoid a toll established contrary to the law of nations: *Nauta excusatur si hoc faceret causâ conservandi jus suum*,

made before, and the ship sailed after, the proclamation for reprisals. But a war was at that time expected by every man in both countries; the ambassadors of both were recalled; the fleets at sea, waiting for each other to fight; and the *Pallas* and *Licorne* taken from the enemy. It is indifferent whether the goods were *French* or *English*: The risk insured extends to all captures; and as the same premium was accepted after the proclamation, that was paid before, it appears that the war-risk was in view when the defendant signed.—Shall he avail himself of an event which increases the risk, but which he had in contemplation when he underwrote the policy?"

If it be stated that a ship was *ready to sail* on a certain day, when in fact she had failed, this is a misrepresentation

Every representation respecting the state of the ship, and the time of her sailing, is material; and therefore if it be stated that a ship was *ready to sail* on a certain day, when in fact she had sailed the day before, this is both a misrepresentation and a concealment, and will avoid the policy (*a*).

Thus much for representations. We will now proceed to consider the nature of concealment, and its effect upon the contract of insurance.

suum, quia vectigal erit illicitum. Straccha de navib. p. 3, n. 8. But if the captain deviate to avoid a toll or duty lawfully authorized, this will discharge the insurers. *Si, pour éviter un péage légitime et autorisé, le capitaine s'écartoit de la voie ordinaire, il seroit en faute ; par conséquent, les assureurs seroient déchargés des risques. Emerig.* tom 2, p. 60.

(*a*) Per Lord *Mansfield* in *Fillis* v. *Brutton*, at N. P. *Park* 182, inf.

CHAP. XI.

Of Concealment.

HAVING, in the foregoing chapter, shewn the necessity of a full and fair disclosure of all the circumstances relating to the intended voyage which may, in any degree, influence the determination of the underwriters in undertaking the risk, or in estimating the premium; we now proceed to the subject of concealment, which may be considered under the following heads:

I. *Of the Nature and Effect of Concealment;*
II. *What shall be deemed a material Concealment;*
III. *What things need not be disclosed.*

Sect. I.

Of the Nature and Effect of Concealment.

Concealment avoids the contract.

CONCEALMENT, or *suppressio veri*, is nearly allied to misrepresentation, or *allegatio falsi*, and consists in the suppression of any fact or circumstance material to the risk. *Dolus malus non tantum in eo est, qui fallendi causâ obscurè loquitur; sed etiam qui insidiosè obscurè dissimulat* (*a*). This, like every other fraud, avoids the contract *ab initio*, upon principles of natural justice. For, as the facts upon which the risk must be estimated generally lie within the knowledge of the insured, or of his agents, the underwriter must, in most cases, rely on him for all necessary information, to enable him to decide upon what terms he will take upon himself the proposed risk; and

(*a*) ff. l. 43. § 2. *de dolo malo.*

he computes the premium, and enters into the contract, in the confidence that the insured, being fully informed of all circumstances relating to the intended voyage, has dealt fairly with him, and has kept back nothing which it might be material for him to know.

But it is not merely on the ground of *fraud* that concealment avoids the contract: Even a concealment which is only the effect of accident, negligence, inadvertence, or mistake, will, if material, be equally fatal to the contract, as if it were intentional and fraudulent (*a*). Nor can the insured, by tendering any increase of premium, require the insurer to confirm the contract (*b*); for, in such case, the insurer has a right to say, that he would not have subscribed the policy *upon any terms*, if he had been informed of the circumstances which were withheld from him; because the risk that was concealed might have occasioned a thousand others. His intention was to undertake only for the risks that were communicated to him: But he was deceived; and that was sufficient to avoid the contract.

Though it be innocent.

It therefore behoves the insured, from motives of common prudence to inform himself of every fact and circumstance which may throw the smallest light on the nature and perils of the proposed adventure; and he is bound, by principles of moral honesty, to disclose to the insurer all such circumstances with the most unreserved candour and frankness.

The insured should therefore disclose all material circumstances.

But the obligation of a strict observance of good faith is equally binding on both parties in all contracts; and, in that of insurance, the *underwriter*, as well as the insured, is bound to disclose all circumstances, within his knowledge, in any degree affecting the risk. If, therefore, it appear that, at the time he underwrote the policy, he knew that the ship was arrived safe, the contract will be void as to him, and an action will lie against

A material concealment, by an underwriter, will avoid the policy as to him.

(*a*) Per Lord *Mansfield*, in *Carter* v. *Boehm*, 1 *Bl.* 594. 3 *Bur.* 1909, and in *Ratcliffe* v. *Schoolbred*, inf. 468.——(*b*) Vid. *Emerig.* tom. 1. p. 20, 21, 68, 69.

him to recover back the premium (*a*).—The law of *France* very properly goes further, and to punish this fraudulent attempt, subjects the underwriter to repay the premium he has thus unjustly obtained, and the double thereof as a punishment for his offence, and a satisfaction to the insured for the risk he ran of being defrauded (*b*).

When a concealment by an agent is fatal.

When an agent causes an insurance to be made on the effects of his principal, whether in pursuance of a particular order, or in virtue of his general authority, a material concealment by him will avoid the contract, though the principal had no knowledge of the fact concealed; but if the agent, acting *bonâ fide* under his general authority, and without any special order, cause an insurance to be effected for his principal, unknown to him, and the agent be ignorant of a loss which had happened, *Valin* and *Pothier*, founding their opinion on a decision of the parliament of *Aix* in 1744, hold that the policy is good, though, at the time it was effected, the principal knew of the loss (*c*). But if the principal, knowing of the loss, had given an order to get the insurance effected, the contract would have been void, though the agent knew nothing of the loss; *nam ille qui mandat, ipse facere videtur.*

Fraud is not to be presumed.

As fraud is never presumed, an underwriter who would impute fraud to the insured, must be prepared to prove it by evidence, according to the maxim, *Incumbit onus probandi ei qui dicit.*

(*a*) Per Lord *Mansfield* in *Carter* v. *Boehm*, 1 *Bl.* 594, 3 *Bur.* 1909.——(*b*) Vid. *Valin* h. t. art. 41. *Pothier* h. t. n. 47.——(*c*) *Valin* h. t. art. 41. *Pothier* h. t. n. 40.

Sect.

Sect. II.

What shall be deemed a material Concealment.

EVERY fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material. Therefore, whatever the insured knows respecting the state of the ship, the nature of the employ in which she is to be engaged, the time of her sailing, the time of her expected arrival, &c. ought to be fully and explicitly disclosed; and the keeping back any fact of this sort will be fatal to the contract. In such case, the concealment so vitiates the policy that it will afford the insured no remedy, even for a loss arising from a cause unconnected with the fact or circumstance concealed; for a concealment is to be considered, not with reference to the *event*, but to its *effect* at the time of making the contract (*a*).

Whatever respects the state of the ship, the time of sailing, &c. is material.

As, where an insurance was made on a ship from *Plymouth* to *Bristol*, and it appeared that the broker's instructions stated that the ship was ready to sail on the 24th of *December*, when, in fact, she had sailed on the 23d:—Lord *Mansfield* ruled that this was a material concealment and misrepresentation. He said;—"In all insurances it is essential to the contract, that the insured should represent the true state of the ship, to the best of his knowledge. On that information the underwriters engage. If he state that as a *fact*, which he does not *know* to be true, but only *believes* it, this is a misrepresentation. He is bound to tell the underwriters truth. The material point in this case, therefore, is, had the ship sailed, or was she in port?"—The jury, upon this direction found for the defendant.

Fillis v. Brutton, at N. P. *Park*, 182.

The broker's instructions state that the ship was ready to sail on the 24th of *December*, when in fact she had sailed on the 23d: This is a material concealment.

(*a*) Vid. *Seaman v. Fonnereau*, 2 *Str.* 1183, inf. 472.

Ratcliffe v. *Shoolbred*, at N. P. MS.

The insured, knowing that his ship had *failed* from the coast of *Africa* on a certain day, only states that she was *on the coast*, on that day. This is a material concealment.

So, where a ship insured, 'At and from the coast 'of *Africa* to her last discharging port in the *West* '*Indies*,' failed from the coast of *Africa*, on the 2d of *October*, and was captured on the 6th of *December*.—On the 22d of *February*, the owner received information that she was well, and had failed from *Africa* on the 2d of *October*; and on the same evening wrote to a broker to get an insurance made on her, adding these words;—'As she is *rather long*, and we do not think it prudent to 'run so large risk at so critical a time.'—'We expect to 'hear of her soon.' Fearing, however, that if some intimation were not given of the information they had received, this might affect the policy, they ordered the broker to add to his instructions, "The above ship was "on the coast the 2d of *October*," but said nothing of her having *failed* on that day.—On the trial it was objected, that there had been a material concealment of the true state of the ship.—Lord *Mansfield* told the jury,—"That the insured were bound to represent to the underwriters all the material circumstances relative to the ship and the voyage; that if he did not, though the omission were by accident or negligence, the underwriters were not liable, and *à fortiori*, if he suppressed or misrepresented any thing from *fraud*; that the plaintiffs in this case, having concealed a material part of the information they received, it was a fraud, and the insurers were not liable."—The jury, under this direction, found for the defendant.

A well-founded [illegible] of a [illegible]cealment, [illegible] amount to [illegible] of fraud.

The following case, though upon a mere question of fact, will shew to what length the courts will go upon a well-grounded suspicion of fraudulent concealment.

[illegible]*wart* v. *Dun*-[illegible], in Dom. [illegible] April 18th, [illegible].

A friend of the [illegible] of a ship [illegible] of her [illegible], in[illegible] the [illegible]'s clerk of [illegible] misfortune;

One *Boog* at *Greenock*, a friend of the owner of the ship *Peggy*, and partner with him in some other adventures, was informed by a person just arrived at *Greenock*, that the *Peggy* was taken. *Boog desired it might be concealed*, and the same day had a conversation with the owner's clerk; but the clerk in his evidence deposed, that at no part of that day had he any conversation with, or information from *Boog*, relative to the *Peggy*, *nor any hint*

from

from him or any other person relative to the making of any insurance upon her, further than *Boog's* asking him, '*if* '*he knew whether there was any insurance made upon her.*' Afterwards the clerk, by the desire of the owner, wrote to get an insurance effected, which he did without stating a word to his master of the conversation with *Boog*.— Upon this case, though it did not appear that the owner knew of the loss at the time he ordered his clerk to write, yet it was decreed by the Lords of Session in *Scotland*, and their decree was afterwards affirmed in the House of Lords, that the insurance would not have been made if the intelligence of the capture of the *Peggy* had not arrived at *Greenock* the preceding day; and that therefore the policy was void.

and he, the same day, by order of the owner, writes to have an insurance effected:— The concealment by the clerk avoided the policy, supposing the owner quite innocent.

The reason of this decision seems to be, that though no knowledge of the loss, at the time of making the insurance, was brought home to the owner himself, yet that, what passed between the clerk and *Boog* must have been deemed sufficient proof that the clerk knew of the loss at the time he wrote the letter; and *his* concealment of that was sufficient to avoid the policy.

So, where the plaintiff received, on the 24th of *November*, a letter from *Lisbon*, dated the 8th of the same month, that the ship *was ready to sail*, but did not make the insurance on the receipt of the letter, nor till the 2d of *December*, after the arrival of another ship which sailed at the same time with the ship insured, and did not then communicate the contents of the letter to the underwriters. Lord *Kenyon* held this to be a concealment which avoided the policy (*a*).

M'Andrews v. *Bell*, 1 *Esp.* Rep. 373.

Concealment of a fact from which the time of the ship's sailing might be inferred, is material.

So where the shippers of goods at *Berderigge*, on the 30th of *November* 1802, wrote to the consignee in *London* in these words: 'I think the captain will sail to-morrow; 'but should he not be arrived in your port, you will be 'so kind as to make the insurance as low as you can, for 'my account.' The consignee received this letter on the 13th of *December*, and the next day effected the policy

Willis & others v. *Glover*, 1 New Rep. 14.

The owner, 30th *Nov.* 1802, writes to his consignee that the ship was expected to sail the next day on a voyage, usually performed in from five to ten days. This letter was not received till the 13th *Dec.*—Next

(*a*) Vid. *Webster* v. *Foster*, 1 *Esp.* Rep. 407, and *Charaud* v. *Angerstein*, *Peake*, 43.

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shewing it is a fatal concealment.

without communicating the letter to the underwriters. It appeared that it was not the custom for ships to sail on this voyage without a fair wind; and that it was often performed in four or five days, and, when the weather was not favourable, in about 10 days. The ship did not in fact sail till the 24th of *December*.—The court held this to be a material concealment; for the writer plainly supposed that the ship might arrive before the letter.

If, at the time the policy is effected, the insured have any reason to consider the ship as a *missing ship*, he ought to disclose it. With great deference I am inclined to doubt whether the following decision be strictly conformable to this rule.

Littledale v. Kenyon; 1 New Rep. 151.

Two ships sail from the place of departure, the one two days before, the other three days after, the time fixed for the sailing of the ship insured, and both arrive at the place of destination on the same day. The arrival of the first was communicated to the underwriters, but not that of the second:—Held not to be a material concealment.

A policy was effected at *Whitehaven* on the *Cumberland* from *Barbadoes* to *Liverpool*, pursuant to a letter of orders written by a broker at *Liverpool* on the 8th of *January*, in which he said,—'The *Cumberland*, we expect, will have 'taken her departure from *Barbadoes* on the 26th of *No*'*vember*. The *Barton* sailed on the 24th, and arrived at '*Liverpool* on *Sunday* last (the 5th of *January*); but she is 'coppered, and a remarkably fleet vessel.'—It appeared that another vessel, the *Agreeable*, which left *Barbadoes* on the 29th of *November*, had also arrived at *Liverpool* on the 5th of *January*; but that she also was coppered, and a remarkably fast sailer; that an entry of the arrival of both these vessels on the 5th of *January* had been made in the broker's book at *Liverpool*; that the *Cumberland* was not coppered, and was full built, and a slow sailer; and it was sworn by a witness for the plaintiff, that the *Cumberland* was not considered as a missing ship, and that a knowledge of the arrival of the *Agreeable* as well as the *Barton* could not vary the premium.—Upon this case it was left to the jury to determine whether the broker at *Liverpool* had fraudulently suppressed the arrival of one ship when he communicated the arrival of the other.—The jury found a verdict for the plaintiff, and upon a motion for a new trial, the court held that the jury alone could decide whether the arrival of the *Agreeable* was a ground for considering the *Cumberland* as out of time or not.

Observations on this case.

Upon this case one would be inclined to ask, why was the policy effected at *Whitehaven*, and not at *Liverpool*; and

and why the broker communicated to the underwriters the arrival of the *Barton*, which sailed two days *before*, and not that of the *Agreeable*, which sailed three days *after*, the time fixed for the sailing of the *Cumberland*? Without satisfactory answers to these questions, it were impossible not to entertain some suspicion of fraud; and therefore the case seems to have called for reconsideration.

It is in some cases necessary to state to the underwriters the nature of the service in which the ship is to be employed; and if this be attended with any extraordinary danger, the concealment of it will avoid the policy.

If a ship is to be employed in a service of peculiar danger, this should be stated to the insurers.

Emerigon (*a*) reports the following decision to prove this proposition.—A ship was chartered by the commissaries of the *French* army, and the owner caused her to be insured, without mentioning the nature of the service she was to be employed in, which was very likely to be attended with extraordinary risk: In fact the commissaries were under the orders of the commanding officer, in the execution of which the ship was lost.—It was decreed in the Parliament of *Aix* that the insurers were not answerable.

It is adviseable for the broker or agent to disclose all he knows respecting the proposed adventure, and not presume to exercise his own judgment upon the materiality of any part of it; for if, in representing the state of the ship, and the last intelligence concerning her, he do not disclose the *whole*, and what he conceals shall appear to be *material*, the contract will be void, though the concealment was without any intention of fraud, and merely because *he thought* the matter concealed *immaterial* (*b*).

A material concealment is fatal, though the broker think it immaterial.

Even doubtful rumours respecting the safety of a ship which is meant to be insured "*lost or not lost*," how little credit soever the owner himself may give them, ought to be faithfully disclosed to every underwriter; and the withholding such information will avoid the contract.

Even doubtful rumours respecting the safety of the ship ought to be disclosed.

As where a man, having a doubtful account that a ship, like one belonging to himself, had been captured, caused

Da Costa v. *Scandaret*, 2 P. W. 170.

(*a*) Tom. 1. p. 172.—(*b*) Per Cur. in *Shirley* v. *Wilkinson*, *Doug*. 306.

his ship to be insured, without giving any notice to the underwriters of what he had heard.—In this case it was determined that the insurance was void; for though the insured had no certain intelligence that his ship was taken; yet, if he had fairly disclosed what he had heard, it must be supposed that the underwriters would at least have insisted on a higher premium, if they would have insured at all.

Such, indeed, is the abhorrence in which the law holds fraud, that, though the misfortune which the intelligence concealed might have given reason to apprehend, never happened, still the contract will be void.

Seaman v. *Fonnereau*, at N. P. 2 *Str.* 1183.

The owner having received uncertain intelligence of a ship being lost in a storm, gets her insured, without disclosing this information:— The policy is void; and though the ship is well after the storm, yet the insurer shall not be answerable for a subsequent capture.

As where an insurance was made on the ship *Davy* on the 25th of *August*, and it appeared that the agent for the insured had received a letter from *Cowes* two days before, dated the 21st of *August*, wherein the writer informed him, 'That he had been in company with the '*Davy* on the 12th, and at midnight lost sight of her 'all at once; that she was leaky the day before, and the 'next day there was a hard gale.'—It appeared, however, that the ship continued on her voyage till the 19th, when she was taken.—Here, though there was no pretence of any knowledge of the actual loss at the time of the insurance, which was made in consequence of a letter, received the 25th of *August*, from the owner abroad, dated the 27th of *June*; yet it was holden by Lord C. J. *Lee*, that this was a concealment which avoided the policy, and that it was not material that the loss was not such as the letter imported; for a concealment is to be considered with reference to its effect *at the time of the contract*, and not to be judged of by subsequent events. He therefore thought this a strong case for the defendant, and the jury found accordingly.

The non-compliance with an ordinance, though it be contrary to the law of nations, ought to be disclosed.

In the case of *Mayne* v. *Walter*, which we have already noticed (*a*), it appears that by a *French* ordinance, all ships were declared liable to capture, whereof the supercargo should be the subject of a state at war with

(*a*) Sup. 397.

France;

rance; and it seems to have been the opinion of Lord *Mansfield*, that though this ordinance was contrary to the law of nations, yet that, if a neutral insured knew of such an ordinance, and had not complied with it, he was bound to disclose this circumstance to the underwriters, and the withholding it would have been a fatal concealment.

Sect. III.

What things need not be disclosed.

BUT either party may be innocently silent as to many matters which are open to both, and upon which they may both exercise their judgments. *Aliud est celare, alud tacere: Neque enim id est celare quicquid reticeas; sed eum quod tu scias, id ignorare, emolumenti tui causâ, velis eos, quorum intersit, id scire* (*a*). This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favour of either party who is misled by his ignorance of the thing concealed.

Cicero's rule.

How understood.

The insured may be innocently silent as to what the underwriter knows as well as he, however he may have come by his knowledge: *Scientia utrinque par pares contrahentes facit.* The insured therefore needs not mention what the underwriter *ought* to know, what he takes upon himself the knowledge of, or what he waves being informed of. The underwriter needs not be told what lessens the risk agreed upon, and is understood to be comprised within the express terms of the policy. He needs not be told what is the result of political speculations, or general intelligence: For instance, he is bound to know every cause which may occasion natural perils; as the difficulty of the voyage; the variation of seasons; the probability of lightning, hurricanes, &c.: He is bound to know every cause which may occasion political perils; from the rupture of states, from war, and the various operations of war; He is bound to know the probability of safety from the continuance and return of peace, from

The insured need not disclose what the underwriter knows, or ought to know.

Nor what lessens the risk.

Nor general topicks of speculation.

Nor what the insurer is presumed to know.

(*a*) Sic. de off. l. 3. c. 12, 13.

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the imbecility of the enemy, the weakneſs of their councils, or their want of ſtrength.

If an underwriter inſure private ſhips of war from ports to ports, and from places to places, any where; he needs not be told the ſecret enterprizes upon which they are deſtined; becauſe he knows that ſome expedition muſt be in view; and, from the nature of the caſe, he waves the information. If he inſure for a certain term, he needs not be told any circumſtance to ſhew that the riſk may be over in leſs time: Or if he inſure a voyage, with liberty of deviation, he needs not to be told what tends to ſhew that there will be no deviation.

Neither is it neceſſary to communicate to the underwriters that the ſhip inſured is foreign built, though this enabled her to ſail without convoy, and without a licence to do ſo, being within the exception of the ſtat. 38 *G.* III. c 76, § 6; it being the buſineſs of the underwriter to obtain this information for himſelf (*a*).

Nor things which are equally open to both parties.

Men argue differently from natural phenomena and political appearances: They have different capacities, different degrees of knowledge, and different intelligence: But the means of information, and judging upon thoſe ſubjects are open to both: Each profeſſes to act from his own ſagacity; and therefore neither needs to communicate to the other.

Thoſe things only need be diſcloſed, which the one privately knows, and the other has no reaſon to ſuſpect.

The reaſon of the rule which obliges the parties to a mutual diſcloſure of all material information, is to prevent fraud and promote good faith: But it is applicable to ſuch facts only as vary the nature of the contract, which one party privately knows, and the other is ignorant of, and has no opportunity of knowing, nor any reaſon to ſuſpect. The queſtion, therefore, in caſes of concealment, muſt always be, whether there was, under all the circumſtances, at the time the policy was underwritten, a full and fair ſtatement, or a concealment; Fraudulent, if deſigned; or, though not deſigned, varying materially the object of the policy, and changing the riſk

(*a*) R. *Long* v. *Bolton*, 2 *Boſ.* & *Pul.* 209.

underſtood

understood to be run (*a*); and in both cases avoiding the contract.

There needs be no previous representation as to the state of the ship.

It is a rule, that it is unnecessary to make any communication or disclosure of that which the insured undertakes for by a warranty express or implied; and therefore it is not necessary that there should be any representation as to the state or condition of the ship previously to the effecting of the policy; because, in every contract of insurance, there is an implied warranty that the ship is sea-worthy.

Shoolbred v. *Nutt*, at N. P. after Hil. 1782, MS.—S. C. *Park*, 229.

Letters from the captain, describing the bad state of the ship in her *outward* voyage, need not be shewn to the underwriters in a policy on a homeward one.

Thus:—An insurance was made on a ship and cargo from *Madeira* to *Charlestown*.—In an action on the policy for a loss by capture, it appeared that the captain had written two letters from *Madeira* to the owner, stating that the ship had been very leaky on her voyage thither, and that the pipes of wine had been half covered with water: But, in answer to this, it was proved that the leak had been completely stopped before the ship sailed from *Madeira*.—It was insisted, however, that the not disclosing the two letters was a material concealment which avoided the policy.—Lord *Mansfield* told the jury, that there was no necessity to communicate the letters to the underwriter, or to shew the condition of the ship or cargo at the end of the former voyage. "It is true," said he, "that there should be a representation of every thing relating to the risk, which the underwriter has to run, except it be covered by a warranty. But it is a condition, or implied warranty, in every policy, that the ship is sea-worthy; and therefore there is no necessity for a representation of that (*b*). If she sail without being sea-worthy, the policy is void. The letters might be material evidence to shew that the ship was leaky in her outward voyage; and if nothing had been done to her at *Madeira*, there would have been ground to suppose that she was not sea-worthy when she sailed from thence. But it now appears that the leak was stopped, and that

(*a*) Per Lord *Mansfield* in *Carter* v. *Boehm*, 1 *Bl.* 593. 3 *Bur.* 1909.——(*b*) Vid. sup. 154.

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ſhe was in good condition before ſhe ſailed from *Madeira*:"—Accordingly there was a verdict for the plaintiff.

There are different degrees of ſea-worthineſs, which, if known, may affect the rate of premium.

It cannot, however, be denied that there are different degrees of ſea-worthineſs, which it may be material for the inſurer to know; and which, when known, may greatly influence his mind in eſtimating the riſk and calculating the amount of the premium. One ſhip may fairly be thought capable of performing a given voyage, and may, to a common intent, be deemed ſea-worthy with reſpect to that voyage. Another may be in a condition to encounter much greater ſtreſs of weather, and conſequently to ſurvive where the former muſt periſh. No underwriter, therefore, knowing the difference between theſe two ſhips, would inſure them at the ſame premium.—Yet, as there is, in every policy, an implied warranty that the ſhip is ſea-worthy, it is unneceſſary, in the firſt inſtance, to diſcloſe any thing that forms an ingredient in ſea-worthineſs. If information be particularly called for, the inſured is bound to diſcloſe truly what he knows upon the ſubject; and, in ſuch caſe, his withholding any material fact or circumſtance would be fraudulent, and conſequently fatal to the policy. But, provided the ſhip be in fact ſea-worthy, it is unneceſſary to communicate, unſought, a circumſtance, which, if diſcloſed, would have had the effect of enhancing the premium.

Yet no ingredient in ſea-worthineſs needs be diſcloſed, unleſs it be called for, though a circumſtance exiſt, which, if diſcloſed, would affect the premium.

Heywood & anr. v. *Rodgers*, 4 *Eaſt*, 590.

The captain of a ſhip, inſured from *Trinidad* to *London*, writes to his owners, that ſhe had been ſurveyed *on account of her bad character*; and ſends the ſurvey, which is ſatisfactory:—It is not neceſſary to diſcloſe this letter and ſurvey to the underwriters.

As where the ſhip *Eliza* was inſured from *Trinidad* to *London*, and having ſailed on her voyage, ſtruck upon a reef of rocks off *Tobago*, and was ſo much damaged that ſhe was obliged to put into *Martinique*, where ſhe was found to be unfit to proceed without repair, which could not be had there. In an action on the policy, it appeared that the captain, after his arrival at *Trinidad*, wrote to the plaintiffs, informing them of his ſafe arrival from *Liverpool*; "that he had got his ſhip very clean and all caulked; that ſhe was in very good order, but that he had had a ſurvey on her, on account of her bad character, there being but little encouragement for freight;" that this letter was accompanied by the ſurvey, which was perfectly ſatisfactory, all the ſurveyors agreeing, *that the ſhip was ſufficient to take in her cargo and proceed to any port in* Great

Britain,

Britain *with safety*; that on his arrival, he applied to a Mr. *Mitchell* for freight, which he declined, because the captain of an *African* ship had *offered to take a cargo at a lower freight*, and had informed him that the *Eliza* was a very old ship, and had a very bad character; in consequence of which the captain had the survey made in order to satisfy *Mitchell.*—It was contended on behalf of the defendant, that the policy was void by the concealment of the letter stating the survey at *Trinidad* on account of the ship's bad character; and it was proved that when a survey has been made in the *West Indies*, it was the constant practice to disclose that circumstance to the underwriters, whatever the result of such survey might have been; and that this never failed to enhance the premium; and that some would not underwrite on any terms, on account of the general inaccuracy of such surveys, the taking of, which always indicated a doubt, at least, in the minds of those concerned, which made the ship always suspected.—The court, however, being of opinion that the insured were not bound to communicate to the underwriters the letter or the survey, determined that the plaintiffs were entitled to recover.

It seems sufficient to shew the true state of the ship when the last intelligence left her.

When an insurance is to be made on a homeward voyage, it seems to be sufficient to make a full and true representation of the state the ship was in at the time the last intelligence left her, without detailing all her previous proceedings; and especially if in the statement actually made to the underwriters there be a reference to prior communications which they neglect to enquire into.

Freeland v. *Glover*, 7 *East* 457.

Two letters are received from the coast of *Africa* the first giving a very bad account of the state of a ship, the second giving a more favourable account.—This being a true account at the time it was sent,

Thus: A ship on an *African* voyage, the usual duration of which is several months, sometimes a twelvemonth or more, arrived on the coast in *August* 1799, and in *February* 1800 her then commander wrote a letter to his owners, mentioning 'An attack on her at another place 'on the coast by the natives, who killed the captain and 'several of the crew, and wounded others; by means of 'which, and by a fever, the crew were reduced to five, 'and those all sickly, and not a man to be procured at 'hand; that they were plundered of their clothes, &c. 'and

sufficient to be shewn, without producing the first.

'and their cabin stores were exhausted, and they knew 'not what to do.' A second letter, dated the 21st of *April* 1800, from *Gaboon* river, stated their arrival there, on the 24th of *March*; 'that *the natives finding them* '*weakly-handed, and their goods taken from them, did as* '*they pleased*; that they had *then* nine men on board; '*but* their provisions run very low; that he had men'tioned certain parts of the cargo *in his last letter*, and 'expected to ship the rest, and to sail by the end of the 'next month.'—An insurance was effected in *September* on the production of the last letter only, 'at and from the ship's *first place of trade on the coast of* Africa,' at a premium of twenty-five guineas *per cent.*—It was contended on the part of the underwriters that the first letter, explaining all the causes of the distress, was material, and the suppression of it was a fatal concealment; and the more so as the risk was to commence six months before the writing even of the first letter.—But the court held, that the non-production of the first letter was not a fraudulent concealment.—They said that, as the last letter had made a true statement of the *then* condition and circumstances of the ship, which, though better than when the first letter was written, were still deemed very unfavourable, as appears by the largeness of the premium; that the second letter referred to a *former* one which the underwriters might have called for, if they wished to know the causes of the former difficulties.

The insured is not bound to disclose a circumstance made material by a foreign ordinance, of which he was ignorant.

The following case will shew that the insured is not bound to disclose a circumstance made material by a foreign ordinance, which may be known by either party, but which neither is bound to know, and which neither in fact knows.

Mayne v. *Walter* E. 22 G. III. B. R. MS.— S. C. *Park* 195.

An insurance was made on a *Portugueze* ship, warranted neutral, at and from *Madeira* to her port of discharge in *Jamaica*, with liberty to touch at the *Leeward Islands*.—The ship was captured by a *French* privateer, and condemned in the court of admiralty in *France*, on the ground of her having an *English* supercargo on board; the *French* having lately made an ordinance to authorize this, similar to one made in 1756.—In an action to recover

cover for this loss, it was insisted for the defendant, that the plaintiff ought to have disclosed to him that the supercargo was *English*.—But it was determined by Lord *Mansfield* and the court, that if neither party knew of this arbitrary ordinance, which was against the law of nations, neither was guilty of any fault. If the defendant knew of it, he ought to have enquired what supercargo was on board. But, in this case, both being ignorant of it, both were innocent; and in such case, the underwriter must run all risks.

We will conclude the present chapter with the following singular case, which turned upon a question of concealment, and though not upon a marine policy, is very proper for insertion in this place.

Carter v. Boehm, 3 Bur 1905, 1 Bl. 593.

The governor of a fort abroad insures it against capture for a year: It is not necessary to disclose his speculations on the probability of an attack.

An insurance was made for a year, from the 16th of *October* 1759, against the capture of *Fort Marlborough*, in the island of *Sumatra*, by an enemy; for the benefit of the governor *Geo. Carter*.—The governor's instructions for the insurance were dated the 22d of *September* 1759, and the policy was signed in *May* 1760. The fort was taken by Count *D'Estaigne* within the year, viz. in *April* 1760, and an action brought to recover the loss—On the trial it was objected that there was fraud on the part of the insured, by the concealment of circumstances which ought to have been disclosed; particularly the weakness of the fort, and the probability of its being attacked by the *French*. This was offered to be proved by two letters; one from the governor to *R. Carter* his brother and agent; and the other to the *India* company, from which it appeared that the *French*, being unable to relieve their friends on the coast, were the more likely to make an attack on this settlement, which they had designed to take by surprize the year before; and that the broker who effected the policy, on his cross examination, said that *in his opinion*, these letters ought to have been produced or the contents disclosed; for if they had, the policy would not have been underwritten. —In reply to this, it was shewn, that the governor had 20,000l. in effects in the fort, and only insured 10,000l.; that it did not appear that the *French* had any design to make the attack till the end of *March*, that the governor had

had acted as in full security down to *February*, and in that month turned his money into goods, and that, though his office was mercantile and not military, he was guilty of no fault in the defence of the place, which was not calculated to resist an *European* force, but only for defence against the natives.—The plaintiff had a verdict.—Upon a motion for a new trial, the court, after time taken to deliberate, were clearly of opinion that the plaintiff was entitled to recover, and that the verdict ought to stand.—Lord *Mansfield*, in delivering the opinion of the court, said;—"The contingency was, whether *Fort Marlborough* would be attacked by an *European* power, by *sea*, between *October* 1759 and *October* 1760. If it was, it must be taken, being incapable of resistance. The underwriter in *London*, in *May* 1760, could judge much better of the probability of this contingency, than governor *Carter* could at *Fort Marlborough* in *September* 1759. He knew the success of the operations of the war in *Europe*, what naval forces the *English* and *French* had sent to the *East Indies*, and whether the sea was open to any attempt from the *French*. He knew, or might have known, every thing which was known at *Fort Marlborough* in *September* 1759, of the general state of affairs in the *East Indies*, or of the particular condition of *Fort Marlborough*, by the ship which brought the orders for the insurance (*a*). Under these circumstances, he insures against the general contingency of the place being attacked by an *European* power. If there had been any design on foot, or enterprize begun, in *September* 1759, it would have varied the risk understood by the underwriter, on account of his not being told of a particular design *then subsisting*. But the governor had no

(*a*) There is nothing in the report of this case from whence it can be fairly inferred, that the underwriter knew, or might have known, all these things. The probability seems to be the other way; nor is it, I conceive, any excuse for a concealment, that the underwriter might, by exploring every source of information, have learned all that was necessary for him to know.

notice of ſuch a deſign, nor was there, in fact, any ſuch deſign. The attempt was made without premeditation, from the ſudden opportunity of a favourable occaſion, by the connivance of the *Dutch* which tempted *D'Eſtaigne* to break his parole. —As to the *firſt* concealment, that he did not diſcloſe the condition of the place;—The underwriters knew that the inſurance was for the governor, who muſt be acquainted with the ſtate of the place, and who could not diſcloſe it conſiſtently with his duty (*a*); but, by inſuring, he apprehended at leaſt the probability of an attack. With this knowledge, and without aſking a queſtion, the defendant underwrote; and, by ſo doing, he took the knowledge of the ſtate of the place upon himſelf; though it was a matter about which he might have been informed various ways: It was not a matter within the private knowledge of the governor only. But independently of that, it is enough if the fort was in the condition in which it ought to be, which was only to reſiſt the natives; in like manner as that a ſhip inſured is preſumed to be ſea-worthy. The contingency inſured againſt was, whether the place would be attacked by an *European* force, and not whether it would be able to reſiſt ſuch an attack, if the ſhips could get up the river. It was found that this was the contingency in the contemplation of the parties.—The *ſecond* concealment was, his not having diſcloſed that the *French*, not being able to relieve their friends on the coaſt, might make an attack on him. This was mere ſpeculation dictated by fear, and not a fact in the caſe. It was a bold attempt for the conquered to attack the conqueror in his own dominion. The practicability of it depended on the *Engliſh* naval force in thoſe ſeas, of which the underwriter could better judge at

(*a*) The argument here uſed is not quite conſiſtent with a ſubſequent part of this judgment, where, to prove that no fraud was imputable to the governor, it is ſaid,—'By the ſame conveyance which brought his orders to inſure, he wrote to the 'company every thing which he knew or ſuſpected; and deſired 'nothing to be kept a ſecret which he wrote either to them or 'his brother.'

London, in *May* 1760, than the governor at *Fort Marlborough*, in *September* 1759.—The *third* concealment was that he did not disclose the design of the *French* to attack the place the year before. That design rested merely in report; but taking it in the strongest light, it is the report of a design the year before; but then dropped.—Another silence, not objected to, was, that it appeared by the governor's letter to his agent, that he was apprehensive of a *Dutch* war: That he had good grounds for this apprehension appeared from the subsequent conduct of the *Dutch*, to whom the loss of the place was owing. The reason why the counsel did not object to this concealment was, because it must have arisen from political speculation, and general intelligence; and it is not necessary to disclose such things to an underwriter.—With respect to the opinion of the broker, the jury were not bound to pay the least regard to it. It was mere opinion, after the event. If rightly formed, it could only be drawn from the same premises from which the court and jury were to determine the cause; and therefore improper and irrelevant in the mouth of a witness.—With respect to the governor, there was no ground to impute fraud to him. By the same conveyance which brought his orders to insure, he wrote to the company every thing he knew or suspected. He desired nothing to be kept secret which he wrote to them or to his brother (*a*). The reason of the rule against concealments is to prevent fraud and encourage good faith (*b*). If the defendant's objec-

(*a*) What he wrote to the company was not likely to be made public, and therefore not likely to come to the knowledge of the underwriter! What he wrote to his brother ought to have been disclosed: And though this concealment might not be imputable to the governor as a *fraud*, yet its effect in avoiding the policy would be the same. It is said that he desired nothing to be concealed: But a concealment without the desire, or even against the will, of the insured, will avoid a policy. Vid. sup. 465.——(*b*) We have his Lordship's authority, and the authority of plain reason, for saying, that a concealment may avoid a policy, and yet be quite innocent. Vid. sup. 465.

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tions were to prevail, in the present instance, the rule would be turned into an instrument of fraud. The underwriter, knowing that the governor apprehended danger, and that he must have some ground for his apprehension, being told nothing of either, signed the policy, without asking a question. If the objection, "that he was not told" be sufficient to vacate it, he took the premium, *knowing* the policy to be void (*a*), in order to gain if the alternative turned one way, and make no satisfaction, if it turned out the other. There was not a word said to him of the affairs of *India*, or the state of the war there, or the condition of *Fort Marlborough*. If he thought that omission an objection at the time, he ought not to have signed the policy, with a secret reserve in his own mind to make it void (*b*): If he dispensed with the information, and did not think this silence an objection then, he cannot take it up now after the event (*c*)."

I have stated this celebrated case, and the arguments in support of the judgment, more at length than was consistent with the plan of this work; and I have taken the liberty to make some short remarks, in the form of notes on several passages, which appeared to me disputable. For with all the veneration and deference which I feel for the distinguished character and talents of the noble person who delivered that judgment, the duty of the task which I have imposed upon myself obliges me to declare, that I have not been Observations.

(*a*) It is here assumed that the underwriter knew that the policy was void.—How could he know that it was void by reason of a concealment, without knowing what was concealed? Upon whom does the obligation lie; the insured to disclose what he knows, or the underwriter to fish it out by questioning the broker or agent? The argument goes to prove, that if the underwriter ask no questions, the insured is obliged to disclose nothing; which is true only with respect to matters of public notoriety ——(*b*) How could he judge of the omission, without knowing what was omitted?——(*c*) How could he be supposed to dispense with information when the silence of the insured was, according to all practice, a proof that he had none to communicate?

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able to ſatisfy my own mind that it is warranted even by the principles which his lordſhip himſelf lays down as the baſis of it (*a*). A ſtronger caſe of an inſurance againſt the policy of the law could ſcarcely be put, than one in which the inſured lays himſelf under the neceſſity either of revealing that which his duty as governor forbade him to diſcloſe, or of concealing from the underwriters thoſe things which it was material for them to know, and which juſtice would require him to communicate. It is ſaid, however, "that the caſe ſo ſeldom happens, that little danger is to be apprehended from the example."—That ſuch an inſurance is without example may be urged as one argument againſt its legality. But if a contract, which is contrary to principles of public convenience, be once ſanctioned by high authority, no man can foreſee to what extent the miſchievous principle may afterwards be carried.—But then it is ſaid, "that this objection could not, upon any ground of juſtice, be made by an underwriter, who knew the inſured to be governor at the time he took the premium."—This goes to prove that an underwriter who takes a premium upon an inſurance which he knows to be illegal, cannot afterwards object to the illegality of it.—This, *as between the inſurer and the inſured*, would undoubtedly be juſt: But principles of public convenience demand that the juſtice of the caſe, as between the parties, ſhall ſometimes yield to a higher conſideration, namely, the probable operation of the precedent upon public morals, or the public intereſt (*b*).

(*a*) Theſe principles which are, in general, abſtract propoſitions of indiſputable truth, and are laid down with admirable clearneſs and preciſion, will be found in the beginning of this chapter.——(*b*) Vid. ſup. 56.

END OF VOL. I.